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In the Supreme Court of the United States

SPRING TERM, 1971

CASE No. 71-10

INTERCONTINENTAL PROMOTIONS, INC.
Petitioner,

vs.

MIAMI BEACH FIRST NATIONAL BANK, and FRED R. BAISDEN, as executors of the Last Will and Testament of W. B. McDONALD, JR., deceased, and NEW AMSTERDAM CASUALTY CO.,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

HANSFORD H. TYLER JR.
and DAVID D. PHILLIPS
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and MURRAY SAMS
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MIAMI REVIEW — 371-4853 — 377-3721

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Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner prays that a Writ of Certiorari be issued to review the decision and judgment of the United States Court of Appeal for the Fifth Circuit, entered and rendered in the above-entitled cause on April 9, 1971, to which a Petition for Rehearing was denied on May 19, 1971.

OPINIONS BELOW

(a) *First Appeal*:

The United States District Court, Southern District of Florida, in the case entitled INTERCONTINENTAL PROMOTIONS, INC. vs. W. B. McDONALD, JR. and NEW AMSTERDAM CASUALTY COMPANY, entered an order dismissing the complaint of INTERCONTINENTAL PROMOTIONS, INC., on April 7, 1965, which cause is unreported but appears as A of the Appendix accompanying this Petition.

On October 10, 1966, the United States Court of Appeals for the Fifth Circuit, rendered an opinion reversing the order of dismissal entered by the United States District Court, Southern District of Florida, on April 7, 1965, which said opinion and decision is reported at 367 F.2d 293 and appears as B of the Appendix accompanying this Petition. Petition for Rehearing directed to the opinion of October 10, 1966 aforesaid, was denied.

Pursuant to the remand under the opinion and decision of October 10, 1966 aforesaid, the cause reoccurred for trial before the United States District Court, Southern District of Florida, without a jury and was tried resulting in findings of fact, conclusions of law and a judgment for money in favor of the Petitioner in the sum of $537,406. The findings of fact, conclusions of law and money judgment appear as C of the Appendix accompanying this Petition. A Motion for New Trial, directed to the aforesaid judgment, was denied.

(b) *Second Appeal:*

An appeal by the Respondents to the United States Court of Appeals for the Fifth Circuit, resulted in a reversal of the judgment of the United States District Court, Southern District of Florida. An opinion and decision of reversal was entered by the United States Court of Appeals for the Fifth Circuit on April 9, 1971, which said opinion has not been officially reported but the same appears as D of the Appendix accompanying this Petition. Petition for Rehearing, Petition for Rehearing En Banc, and Suggestion for Certification to the Supreme Court of Florida, were denied.

JURISDICTION

The jurisdiction of this Court is invoked under 28 USC, Section 1254 and Rule 19(b) of the Rules of the Supreme Court of the United States. The matter here involves controlling local law of the States of Florida upon which the appellate courts of Florida have not made a decision and which involves the public policy of the State of Florida as expressed in a legislative Act. Further, this case demonstrates a departure from the accepted and usual course of judicial proceedings to such an extent as to call for an exercise of this Court's supervisory powers and the exercise of its discretionary certiorari powers.

QUESTIONS INVOLVED

(a) Should the United States Court of Appeals for the Fifth Circuit, in the second appeal, have initially considered and interpreted a state statute of Florida prior to

a consideration thereof by the courts of that state where there exists the procedural machinery to obtain a ruling on state law from that state's highest tribunal and where the effect of the consideration and interpretation accorded the state statute by the Court of Appeals, was to render portions of said statute invalid.

(b) Was an opinion and decision of the United States Court of Appeals, for the Fifth Circuit, overruling its prior decision in the same case on the same point of law, a departure from the accepted and usual course of judicial proceedings to such an extent as to warrant the exercise by this Court of its supervisory powers.

STATEMENT OF THE CASE

The Petitioner, in December, 1963, entered into a written contract with W. B. McDonald, Jr., (now deceased and the present Respondents substituted in his place and stead), whereby the Petitioner sold to McDonald for a stipulated price, the right to stage and handle the live gate aspects of a world championship boxing exhibition between Cassius Clay, the challenger and Sonny Liston, the champion. The contract is included in the Appendix accompanying this Petition as exhibit E. Clay and Liston, on February 25, 1964, engaged in a world championship prize fight, at Miami Beach Convention Hall, where Clay became the new heavyweight champion by knocking out Liston in the Seventh Round.

The Petitioner's main undertaking as disclosed by the contract between itself and W. B. McDonlad, was to produce the two fighters, Clay and Liston, at a time, place

and on a date specified by McDonald and to have them available for promotional purposes. McDonald had the right and privilege to promote, stage and handle the live gate aspects of the fight and agreed to pay the Petitioner for that right, $625,000.00. The Petitioner retained all ancillary rights such as telecasting, broadcasting and moving pictures. The live gate produced slightly in excess of $224,000.00, which was paid by McDonald to the Petitioner, leaving a balance due by him to the Petitioner of approximately $400,000.00. When McDonald refused to pay the balance due under his contract, an action was brought in the United States District Court, Southern District of Florida, by the Petitioner upon the contract. The Respondents moved to dismiss the complaint on the ground that it failed to state a claim upon which relief could be granted and upon the further ground that the contract sought to be enforced was illegal by reasons of Florida Criminal Statutes 548.01, 548.02 and 548.03.

Florida Statutes, Section 548.01 makes the participation, etc., in such a fight a felony unless it comes within one of the exceptions to Section 548.03 of the Florida Statutes. This Section (548.03 FSA), made it lawful to conduct such fights if they are " * * * held by and under the auspices of * * * Veterans of Foreign Wars of the United States * * * or (other named organizations)," and, or where regulated by municipalities in the exercise of their police powers, such exhibitions were held " * * * under the auspices of the above-named organizations".

After the Respondents' Motion to Dismiss had been filed, the Petitioner filed an Amendment to its Complaint in which it plead specifically that the pugilistic contest in

question was held by and under the auspices of the Veterans of Foreign Wars and was licensed or permitted by the City of Miami Beach, Florida as a pugilistic exhibition held under the auspices of the Veterans of Foreign Wars. Thereafter, the Respondents' Motion to Dismiss was argued before the trial court and that court on April 8, 1965, entered an order and judgment dismissing the Petitioner's Complaint and finding that the fight held by McDonald violated Section 548.01 and 548.03 of the Florida Criminal Statutes.

From the judgment of dismissal the Petitioner took an appeal to the United States Court of Appeals for the Fifth Circuit, which Court by a two to one vote, reversed the trial court and held (367 F.2d 293) that even without the benefit of the Amended Complaint, "the contract is not on its face, unlawful, McDonald's obligation under the contract 'to stage and handle the live aspects of the promotion' *should be construed to include the burden of making arrangements for a lawful fight.* If there is any doubt as to what the parties meant, a trial should be had, not to *contradict the contract*, but to show what the parties meant by their contract". (Emphasis supplied) The cause was remanded to the trial court to determine whether the fight was held by and under the auspices of one of the approved groups.

The cause was tried in the trial court before a judge without a jury and resulted in findings of fact, conclusions of law and a money judgment for the balance due on the contract in favor of the Petitioner. Specifically, the trial judge found "that the municipality of Miami Beach exer-

cised its police powers in regulating this match and it was held under the auspices of the VFW, Post 3559".

The Respondents then took an appeal to the United States Court of Appeals for the Fifth Circuit, and that Court in a unanimous opinion, dated April 9, 1971, not yet reported but included in the Appendix accompanying this Petition, said that "The conclusion is inescapable that the Liston-Clay fight was not held under the auspices of the VFW. The use of the organization's name was a mere fiction to avoid the prohibitory Florida Statute and a representation on the printed tickets of the VFW's sponsorship was an obvious subterfuge designed to present a nominal compliance with the Florida law". The Appeals Court prefaced this statement by the observation that McDonald had performed all the necessary actions requisite to promoting and staging the fight. The Court further held "the evidence shows that the parties, *pursuant to their contract*, accomplished an unlawful purpose by virtue of an apparent subterfuge. Under the circumstances the law will leave the parties where it finds them and no relief shall be granted because of the dominate public interest." (Cites omitted) (Emphasis supplied). The Appeals Court also found that although McDonald had the obligation to conduct a lawful fight under the contract, *he could nevertheless raise his illegal compliance as a bar to the Petitioner's recovery on the contract.* (Emphasis supplied)

Petition for Rehearing, Petition for Rehearing En Banc, and a Suggestion for Certification to the Supreme Court of Florida, were all denied.

REASONS FOR GRANTING THE WRIT

(a) This Court, in UNITED GAS PIPE LINE, CO., v. IDEAL CEMENT CO., 369 U.S. 134, 82 S.Ct. 676 (1962) vacated a judgment of a circuit court of appeal initially interpreting state legislation. This Court there said:

> "The interpretation of state law by the Court of Appeals, in an opinion by its Alabama member, was rendered in advance of construction of the License Code by the courts of the state, which alone, of course, can define its authoritative meaning. We ought not, certainly on this record, either accept the Court of Appeals' construction or, on an independent consideration, reject what the Alabama Supreme Court may later definitively approve. The availability of appropriate declaratory-judgment proceedings under Ala. Code, Tit. 7, §§ 156-168 (1940), avoids this unsatisfactory dilemma. Wise judicial administration in this case counsels that decision of the federal question be deferred until the potentially controlling state-law issue is authoritatively put to rest. See Leiter Minerals, Inc., v. United States, 352 U.S. 220, 228-229, 77 S.Ct. 287, 1 L.Ed. 2d 267. Accordingly, the judgment of the Court of Appeals is vacated to permit a construction of the License Code of the City of Mobile, so far as relevant to this litigation, to be sought with every expedition in the state courts. It is so ordered. * * * "

Likewise in the case of CLAY v. SUN INSURANCE OFFICE LIMITED, 363 U.S. 207, 80 S.Ct. 1222 (1960), this Court vacated a judgment of the Court of Appeals for the Fifth Circuit and required that the case be sent to the Supreme Court of Florida to obtain an interpretation by that Court of Florida Statute 95.02.

That a necessity beyond that suggested by this court in the aforementioned opinions, exists in the case sub judice, by reason of the fact that the Court of Appeals for the Fifth Circuit, in its precipitous interpretation of the Florida Statute governing the holding of prize fights and pugilistic contests, has effectively invalidated the State Statute by its construction of the exemption provisions of that Statute.

(b) One of the considerations governing the granting of certiorari by this Court as set forth in Rule 19(b) of the Rules of this Court, is where a Court of Appeals has rendered a decision in conflict with a decision of another Court of Appeals on the same matter. However, there is no specific provision in this Court's Rules for the granting of certiorari to review a decision of a Court of Appeal which conflicts with a decision of the same Court of Appeal on the same subject matter in the same case. The latter, we suggest, is the situation exemplified by this case and as such we urge that it departs from the accepted and usual course of judicial proceedings so as to call for an exercise of this Court's power of supervision.

The basis of the Petition's contention here is that the opinion rendered by the Court of Appeals of the Fifth Circuit, on April 9, 1971, directly or by fair implication overruled the decision and opinion of that same Court rendered in the same case on October 10, 1966, reported at 367 F.2d 293. The latter or *first opinion* of the Court of

Appeals found and *adjudicated as a matter of law that the contract on its face was not unlawful and that the Respondent's decendent had the burden of making arrangements for a lawful fight.* (Emphasis supplied.) In the second opinion of April 9, 1971, not yet reported, another panel of the same Court, but including one member of the panel who had participated in the prior opinion of October 10, 1966, held that the evidence disclosed that McDonald had resorted to a subterfuge designed to present a nominal compliance with Florida Law in the performance of the contract. The Petitioner's performance was known to the Court of Appeals on each appearance of the case before that Court, that is, the Petitioner pursuant to the contract had produced the two fighters and they had engaged in a prize fight for the Heavyweight Championship of the World. In the second opinion aforesaid, the Court of Appeals concluded that the eivdence showed that the parties "pursuant to their contract" accomplished an unlawful purpose. If the contract was lawful on its face and demonstrated by its terms what the Petitioner was required to do, then the Court of Appeals should not have found nor did it have a basis to find that " * * * pursuant to their contract (the parties) accomplished an unlawful purpose * * * ". The second opinion completely overruled and negated the holding in the first opinion that required McDonald to conduct a lawful fight although the Court in its second opinion found that he performed all the acts in connection with the promotion of the fight. By its second opinion the Court permitted McDonald to plead his unlawful performance as a bar to the Petitioner's recovery. This is more than an academic conflict; it is a denial to this Petitioner of due process and equal protection of the law. Such a result is not only unfair on its face, but manifestly unjust.

CONCLUSION

It is respectfully submitted that the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

HANSFORD H. TYLER JR.
and DAVID D. PHILLIPS

HORTON & SCHWARTZ
and MURRAY SAMS
410 Concord Building
Miami, Florida 33130

By _____
Of Counsel

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that three copies of the foregoing Petition for Writ of Certiorari have been mailed to SIBLEY, GIBLIN, LEVENSON & WARD, 605 Lincoln Road, Miami Beach, Florida this day of , 1971.

By _____
Of Counsel

APPENDIX

APPENDIX A

ORDER OF DISMISSAL

UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF FLORIDA

No. 65-2-CIV-EC

INTER-CONTINENTAL PROMOTIONS, INC.,
Plaintiff,

-vs-

WILLIAM B. MacDONALD, JR., and NEW AMSTERDAM CASUALTY COMPANY,
Defendants.

Filed April 6, 1965, 11:32 A.M.

This matter came on before the Court on the Motion to Dismiss filed by the defendant herein. This action arose upon a contract between the plaintiff and the defendant MacDonald dated December 19, 1963 for the promotion of a "Heavyweight Championship Fight." The defendant New Amsterdam Casualty Company issued a surety bond on January 13, 1964, which bond agreed to pay plaintiff the difference between $625,000.00 and the amount of the "live" gate up to Three Hundred Thousand Dollars ($300,000.00).

The fight was held at Miami Beach, Florida, as contracted for between Charles "Sonny" Liston and Cassius Clay. The defendant MacDonald is alleged to have paid $224,695.83 to the plaintiff, who seeks $400,304.17 from

him and the full amount of the performance bond, $300,000.00 from the defendant New Amsterdam in accordance with the bond. The defendant moved to dismiss on the grounds that the contract in question is in violation of state law and therefore unenforceable.

Florida Statute Section 548.01 (1963) provides that:

> Any person who shall voluntarily engage in any pugilistic exhibition, fight or encounter, with or without gloves, between man and man, or in an exhibition or fight between man and bull, or between man and any other animal, for money or anything of value, or upon the result of which any money or anything of value is to be collected, acquired, bet or wagered, or to see which any admission fee is charged, directly or indirectly, shall be punished by a fine not less than two thousand five hundred, nor more than five thousand dollars, or by imprisonment for not more than five years.

Section 548.03 defines a pugilistic exhibition as —

> By the term "Pugilistic exhibition, encounter or fight, with or without gloves," as used in this chapter, is meant any voluntary fight or personal encounter, by blows, between two or more persons, for money, prize of any character, points, distinction or fame, or other thing of value, or upon the results of which any money or thing of value is bet or wagered, or for which an admission fee is charged, directly or indirectly; provided, that nothing contained herein or in any law or mu-

nicipal regulation shall be construed as applying to boxing exhibitions held by and under the auspices of the American legion, disabled American veterans, veterans of foreign wars of the United States, Spanish-American war veterans, or companies or detachments of the Florida national guard, Y.M.C.A., junior chamber of commerce, or any college which is a member of any recognized amateur athletic association and the Circulo Cubana club, a charitable organization now in existence, whether an admission fee is charged or not; *provided further, that nothing contained herein shall be construed to prohibit any municipality from exercising its police powers to regulate boxing and wrestling exhibitions held under the auspices of the above named organizations.* (Emphasis supplied)

It is a Florida law that a contract in violation of a State statute is void and unenforceable. Schaal vs. Pace, 135 So.2d 252 (Fla. App. 1961); Local No. 234 vs. Henley & Beckwith Inc., 66 So.2d 818, 821, (Fla. 1953).

In the instant case the contract between the parties called for the promotion of a prize fight. None of the parties to the contract are within the exception provided in Section 548.03 of the Florida Statutes, nor does the contract provide that the fight shall be held under the auspices of one of the exempted organizations.

Moreover, the Court is of the opinion that the provision purporting to exempt stated organizations from the operation of the statute is of doubtful constitutionality, even if applicable in the instant case, which it is not. The

exemption provision would extend the privilege of presenting "boxing exhibitions or fights" to certain citizens while denying it to others, without a reasonable basis for classification in violation of the equal protection provision of the Fourteenth Amendment of the Constitution of the United States. See Morey vs. Doud, 354 U.S. 457 (1957).

It is obvious that a "heavyweight championship fight" as called for in the contract is within the statutory definition of prohibited activity. The contract being in violation of state law, it is therefore

ORDERED, ADJUDGED AND DECREED that the Motion to Dismiss should be and the same is hereby granted with prejudice.

DONE AND ORDERED at Miami, Florida, this the 7th day of April, 1965.

EMETT C. CHOATE

UNITED STATES DISTRICT JUDGE

cc: Marion E. Sibley, Esq.
David D. Phillips, Esq.

APPENDIX B

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 22685

INTER-CONTINENTAL PROMOTIONS, INC.,
Appellant,

vs.

WILLIAM B. MacDONALD JR., and
NEW AMSTERDAM CASUALTY COMPANY,
Appellees.

Appeal from the United States District Court for the Southern District of Florida.

(October 10, 1966.)

Before WISDOM and COLEMAN, Circuit Judges, and HUGHES, District Judge.

WISDOM, Circuit Judge: Before a small crowd in Miami Beach, Florida, February 25, 1964, Cassius Clay (Muhammad Ali) knocked out "Sonny" Liston in the seventh round of a lackluster prize fight for the heavyweight championship of the world. Inter-Continental Pro-

motions, Inc. owned both fighters. William B. MacDonald, the on-the- scene promoter, had agreed to pay Inter-Continental $625,000 for the live gate rights. Unfortunately for MacDonald, the gate receipts amounted to only $225,000. He turned over this amount to Inter-Continental. Inter-Continental sued for the balance. MacDonald and his surety now say that it was illegal to promote a prize fight in Florida, and that the contract was illegal on its face. The district court, agreeing with the defendants, dismissed the complaint. We disagree.

* * *

The contract between the parties called for MacDonald "to stage and handle the live aspect of [the] promotion".

The two opening paragraphs of the contract provide:

> 1. Inter-Continental hereby agrees to produce Charles "Sonny" Liston and Cassius M. Clay, Jr., on Tuesday, February 25, 1964, at an hour to be named, at the Miami Beach Convention Hall in Miami Beach, Florida, where they will then and there engage in a boxing contest with each other, for fifteen rounds or less, for the Heavyweight Boxing Championship of the World.
>
> 2. MacDonald shall have the right and obligation to promote said boxing contest in the manner he deems fit; to print and sell admission tickets thereto; to collect the proceeds of ticket sales; to arrange all seating; to make whatever arrangements he deems necessary for the press; to pay all local, state, and federal taxes on admissions; to arrange and pay for the undercard preliminary

> fights; to pay all fees and expenses of the controlling boxing commission; to advertise and promote said live gate; to make press releases; and, to do any and all things of that kind and nature reasonably necessary for the enhancement of said live gate.

MacDonald agreed to post a bond of $300,000 insuring his performance. New Amsterdam Casualty provided this bond.

The contract required MacDonald to pay the sum of $625,000 "upon the completion of tre boxing contest". *At the time MacDonald made his payment of $225,000 apparently he assumed that the contract was lawful.* (Emphasis supplied)

Inter-Continental notified New Amsterdam of MacDonald's default. New Amsterdam refused to pay the $300,000 allegedly due under the performance bond. Inter-Continental then brought this diversity action for breach of contract against MacDonald and New Amsterdam.

The defendants moved to dismiss the original complaint on the ground that Florida law makes it a felony "to voluntarily engage in" or "to render aid" in "any pugilistic exhibition, fight or encounter . . . for which an admission fee is charged"[1] except ". . . boxing exhibitions held by and under the auspices of the American Legion, disabled American veterans, veterans of foreign wars of the United States, . . ." or one of several other specifically approved organizations.[2]

---

[1]FSA—§§ 548.01, 548.02.

[2]FSA—§ 548.03.

Inter-Continental moved to amend its complaint. The amendment alleges facts bringing the contract within the exception permitting "boxing exhibitions" to be held under the auspices of certain organizations:[3]

> "Said contract concerned the holding and conducting of a pugilistic contest whicvh was to be held on February 25, 1964 between Charles 'Sonny' Liston and Cassius M. Clay, Jr. Said contest was held by and under the auspices of the Veterans of Foreign Wars of the United States and was licensed and/or permitted by the City of Miami Beach, Florida, as a pugilistic exhibition held under the auspices of the Veterans of Foreign Wars of the United States. In this connection, plaintiff specially pleads Florida Statutes Annotated Section 548.03 as being the statutory basis for (a) the legal holding and conducting of said pugilistic encounter, and (b) the legality of said contract."

---

[3] 3543.03 "Pugilistic exhibition defined . . . Provided that nothing contained herein or in any law or municipal regulation shall be construed as applying to boxing exhibitions held by and under the auspices of the American legion, disabled American veterans, veterans of foreign wars of the United States, Spanish-American war veterans, or companies or detachments of the Florida national guard, Y.M.C.A., junior chamber of commerce, or any milege which is a member of any recognized amateur athletic association and the Circulo Cubana club, a charitable organization now in existence, whether an admission fee is charge or not; provided further, that nothing contained herein shall be construed to prohibit any municipality from exercising its police powers to regulate *boxing* and wrestling exhibitions held under the auspices of the above named organizations." This provision is not found in the original act, *Laws of Florida*, 1895, *Chapter* 4402, *section* 3, nor in *Gen.St* 1906, *section* 3255; or *Rev.Gen.St.* 1920, *section* 5086. It was added in *Laws of Florida*, 1927, c. 12213, *section 1*; *Comp.Gen.St.* 1927, *section* 7188; *Laws* 1931, c. 14831, *section* 1935, c. 17179, *section* 1, and this was the law in this state thereafter until 1951.

The district court did not rule on this motion for leave to amend nor refer to it in the order dismissing the complaint.

The court gave two reasons for its order. First, the "contract between the parties called for the promotion of a prize fight", not a "boxing exhibition" within the meaning of the exception provided in Section 548.03. Second, even if it was a "boxing exhibition, none of the parties to the contract are within the exception provided in Section 548.03" because none is a member of any of the exempted organizations listed in that section of the law. "Nor does the contract provide that the fight shall be held under the auspices of one of the exempted organizations."

I.

There is no doubt that a contract to perform an illegal act is void and will not be enforced in Florida courts. *Local No. 234 v. Henley & Beckwith Inc.*, 1953, S.Ct. Fla. 66 So.2d 818; *Lassiter & Co. v. Taylor*, 1930, 99 Fla. 819, 128 So. 14. But a close look at the statute's language and legislative history compels the conclusion that the Florida legislature regards a prize fight as a "pugilistic exhibition"; a prize fight with gloves as a permissible "boxing exhibition", if it meets certain requirements.

A. Section 548 was enacted in 1895. Section 548.01 is entitled, "Prize fighting, pugilistic exhibition; penalty." It reads:

> Any person who shall voluntarily engage in any pugilistic exhibition, fight or encounter, with or without gloves, between man and man, or in an exhibition or fight between man and bull, or

> between man and any other animal, for money or anything of value, or upon the result of which any money or anything of value is to be collected, acquired, bet or wagered, or to see which any admission fee is charged, directly or indirectly, shall be punished by a fine of not less than two thousand five hundred, nor more than five thousand dollars, or by imprisonment for not more than five years.

The statutory definition, originally enacted without provisos, is contained in Section 548.03:

> By the term "*Pugilistic exhibition, encounter or fight*, with or without gloves as used in this chapter, *is meant any voluntary fight or personal encounter, by blows*, between two or more persons, for money, prize of any character, points, distinction or fame, or other thing of value, or upon the results of which any money or thing of value is bet or wagered, or for which an admission fee is charged, directly or indirectly. (Emphasis added.)

The defendants construe the definition as referring to three different kinds of pugilism: (1) exhibition, (2) encounter, *and* (3) fight. Or at least two: (1) exhibition and (2) encounter or fight. They rely on Webster's New International Dictionary (2d Ed.) to show that "fight" means "a violent physical struggle for victory" and "encounter" means "a meeting with hostile purpose". They make no reference to Webster's definition of "exhibition" as "any public show; a display as of feats of skill". By exclusion, the defendants reach the result that a "pugilis-

tic exhibition" is not a "fight" or an "encounter" and therefore does not apply to prize fights. Since the contract refers to the contestants as "fighters" and to the match as a "fight for the heavyweight championship", the defendants contend the subject of the contract was a "fight or encounter", not an "exhibition". The defendants assert in their brief that "the definition of the conduct condemned by the statute is for the purpose of differentiating between the condemned conduct and certain conduct not condemned, as set forth in the proviso clause of said section as follows: 'provided that nothing contained herein . . . shall be construed as applying to *boxing exhibitions* held by and under the auspices of the American Legion' " and certain other organizations. This is a patent error, for the legislature defined the condemned conduct in 1895, thirty-two years before the proviso was added to the statute. The 1927 amendment does carve out an exception for certain approved boxing exhibition,[4] but the word "exhibition" as used in this proviso must take the meaning originally given it when Section 548.03 was enacted.

As we read the law, and as the legislature characterized the offense in the title to Section 548.01, the condemned activity is prize fighting or, more accurately, "pugilistic exhibitions". The term "prize fighting" has no technical or common law meaning. *Sullivan v. State*, 1890, 67 Miss. 346, 7 So. 275. A "prize fighter", today as in 1756 when Dr. Samuel Johnson defined the words, is "one that fights publicly for a reward". The legislation prohibits one thing—public displays of pugilism for reward; not two things, (1) sparring exhibitions and (2) fights of encounters. The title to Section 548.03, therefore, is "Pugilistic exhibition defined".

[4]See footnote 3.

A simple test exposes the fallacy in the defendants' theory. If, as they argue, a "pugilistic exhibition" is something different from a "fight" or an "encounter", one should be able to arrive at the definition of pugilistic exhibition by dropping the words "encounter or fight" and that portion of the section relating only to these words. No portion of the section relates exclusively to "encounter or fight". We find, therefore, that

> "By the term pugilistic *exhibition* . . . is meant any voluntary *fight* or personal *encounter* by *blows* . . . at which an admission fee is charged." (Emphasis added.)

Pugilistic exhibitions are therefore public fights for money — in short, prize fights. The laws of some states use the term "prize fighting' 'or its equivalent without qualifying it. In such cases it "includes all fights of that character . . . whether witnessed by many or by few people". *Seville v. State*, 1892, S.Ct. Ohio, 30 N.E. 621, 622. Florida restricts application of the law to pugilistic *exhibitions*, that is, a "public show" or "display" of pugilism, as against private fights.

The syntax and punctuation of Section 548.03 support this construction. The statute uses the singular: one term, "pugilistic exhibition" is defined, not three terms. The phrase "*encounter or fight*" modifies and describes "pugilistic exhibition". It is set off by commas and in the disjunctive sense "*or*" is used to show that pugilistically "fight" and "encounter" are equivalents, and both are other names for "pugilistic exhibition". Of course, sports writers have always used these terms as equivalents and

use them now in faultless sportese to describe "pugilistic exhibitions" or prize fights. For the defendants' construction to be correct, the legislature should have used "*terms*" not "term"; preferred "*and*" to "or", preceded by a comma, if encounter and fight are different; and separated the definitions. If the defendants were right, Section 548.03 should start:

> The terms "pugilistic exhibition, encounter, *and* fight" mean, respectively . . :

In paragraph one of Section 548.02 the legislature does use a comma before "fight", so that all three, "exhibition, encounter, or fight" refer to one thing. In paragraph two of that section these terms are telescoped to "encounter or contest" and, finally, reduced to one word, "contest".[5]

If the defendants' construction were accepted, Section 548.03 would be meaningless. The statute would have no definitions, for "encounter" and "fight" would then be described in their own terms as a "fight or personal encounter by blows". And "pugilistic exhibition" would not be defined at all. On the other hand, the statute does make sense if it is read as stating that a "pugilistic exhibition" means "a voluntary fight or personal encounter by blows.. . . for which an admission fee is charged".

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[5]548.02 Second, Stakeholder, etc.; penalty

Any person who shall act as second, stakeholder, counselor or advisor, or who shall tender aid of any such character, for or to the principal or either of them in such exhibition, encounter, or fight shall be deemed a principal in the offense, and shall be punished as prescribed in § 548.01.

The sheriff or his deputies in any county where there is cause to believe that such an encounter or contest is about to occur, shall enter any house or enclosure, or any other place, and arrest, without warrant, any party engaged or about to engage in such contest.

To accept the notion that a pugilistic exhibition is a mere demonstration of shadow boxing or sparring, one would have to assume that the Florida legislature put such an offense on the same level as bare knuckle fighting. Both offenses would be subject to a fine of not less than $2500 or more than $5000 or imprisonment for not more than five years.

B. The language of this 1895 law must be considered within the context of the times. In 1895 bare knuckle fighting was illegal in almost every state of the union. The Florida statute prohibits prize fighting with or without gloves, but the vice at which the legislation primarily was aimed was public pugilism as then distinguished from boxing.[6] From the time of the 23d Olympiad (688 B.C.) until relatively recently, pugilists fought with their bare hands, or with the caestus (a studded metal glove or wooden hand-shield with slots for the fingers), or wrapped leather thongs around their fists, or used unpadded gloves (a weapon).[7] "Pugilism (from Lat. *Pugil,* boxer) . . . (i.e. fighting with the bare fists) was driven out in favor of boxing (i.e. fighting with the glove) by public opinion and by the general adoption in 1866 of the Marquis of Queensberry rules." Encyclopedia Brittanica (1959), Verbo, "pugilism".

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[6]Before padded gloves were used in prize fights, however, "boxing" and "pugilism" were synonymous. See Egan, Boxiana: Sketches of Ancient and Modern Pugilism from the days of the renowned Broughton and Slack to the Championship of Crib (London 1818) and Miles, Pugilistica, The History of British Boxing . . . from Fig and Broughton, 1719-1740, to the last championship battle between Ring and Heenan in December 1863 (Edinburgh 1906). See also the Gentlemen's Magazine (1731-1832).

[7]I Miles, Pugilistica (Edinburgh 1906); Egan, Boxiana (1818); Menke, Encyclopedia of Sports (1944).

Until the final decade of the nineteenth century, a pugilistic "fight or encounter" meant a bare knuckle fight to the finish under London Prize Ring Rules.[8] These rules permitted the fighters to wrestle, throw each other down, jump on one another, and wear three long spikes in each shoe or boot. A round lasted until one fighter fell or was knocked down or thrown to the ground. The contestants fought until one or the other was forced to stop because of exhaustion or bodily injuries. In 1889, only six years before Florida enacted Section 548, John L. Sullivan, the Boston Strong Boy, won the heavyweight championship by knocking out Jake Kilrain in a clandestine match in Richburg, Mississippi, after 75 rounds and two hours and sixteen minutes of bare knuckle fighting under the London rules.[9] That was the last *pugilistic* fight or encounter for the heavyweight title in the United States. As late as in 1929, the Encyclopedia Brittanica stated, "Boxing [is] the art of attack and defense with the fists protected by padded gloves, as distinguished from pugilism, in which the bare fists or some kind of light gloves affording little moderation of the blow are employed".[10] The first heavyweight title fight with gloves (5-ounce) and under the Marquis of Queensberry rules was not fought until 1892. In that year, in a bout held at the Olympic Club in New

[8]The London rules, as drawn by Jack Broughton, and the Queensberry Rules, drawn by John Graham Chambers, are quoted in Heinz, Fireside Book of Boxing (1961) 51, 75; Menke, Encyclopedia of Sports (1944) 171, 172; Fleischer and Andre, A Pictorial History of Boxing (1959) 12. There is an excellent description of bare knuckle fighting in State v. Olympic Club, 1894, 46 La. Ann. 935, 15 So. 190. See also Egan, supra, Miles, supra, Fleischer, Heavyweight Championship (1949).

[9]See Sullivan, The Life and Reminiscens of a 19th Century Gladiator; Fleischer and Andre, supra; Fleischer, supra.

[10]Encyclopedia Brittanica, Verbo "Boxing".

Orleans, Gentleman Jim Corbett knocked out John L. Sullivan in the 21st round.[11] At the time, Louisiana law (Act 25 of 1890) made prize fighting a crime, but excepted "exhibitions and glove-contests . . . within the rooms of regularly chartered athletic clubs".[12] A "pugilistic [boxing] exhibition" or "glove contest" under Marquis of Queensberry rules was what today is known as a prize fight. "Exhibition" was not used euphemistically. Corbett was one of the most skillful boxers in all prize fight history. The Sullivan-Corbett boxing contest, compared with the Sullivan-Kilrain bare knuckle fight, was an "exhibition" of the manly art of self defense. And in that sense, the Clay-Liston *entente cordiale* was also a boxing exhibition.

In 1894, the State of Louisiana sued to revoke the New Orleans Olympic Club's license on the ground that the Club held, ultra vires, "exhibitions of what is commonly called prize fighting". *State v. Olympic Club*, 1894, 46 La. Ann.

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[11]Corbett has vividly described his fight with Sullivan. Heinz, Fireside Book of Boxing (1961) 85.

[12]"Act No. 25, 1890. Defining the crime of prize fighting, and to provide for the punishment thereof in and out of the state of Louisiana. Section 1. Be it enacted by the general assembly of the state of Louisiana, that any person who shall send, or cause to be sent, publish or otherwise make known a challenge to fight what is commonly called a prize fight, or who shall engage in such fight, or act as trainer for any such, contemplating a participation in such fight ,and any such person who shall act as aider or abettor, backer, umpire, second, surgeon or assistant at such fight, or in preparation for such fight, shall upon conviction thereof, be deemed guilty of a misdemeanor and be punished by imprisonment in the parish jail for not more than six months and be fined not more than five hundred dollars." (Section two is omitted, as unimportant.) But to this section is appended the following proviso, to wit: "Provided this act shall not apply to exhibitions and glove-contests, between human beings, which may take place within the rooms of regularly chartered athletic clubs." 15 So. 190 at 192.

935, 15 So. 190. Reporters, lawyers, doctors, and others testified at the trial that the Sullivan-Corbett fight and similar fights were "mere exhibitions of skill in sparring with gloves, not calculated to do *great bodily* injury"; on the other hand, the Sullivan-Kilrain bare knuckle fight to the finish was a prize fight. The Louisiana Supreme Court upheld the jury's verdict that the Club's boxing matches were "exhibitions or gloved contests". "That a nose was occasionally made to bleed . . . or a fact somewhat bruised and disfigured, does not alter the case." 15 So. at 198. The case was remanded on rehearing on the ground that the expert testimony was inadmissible. On the second appeal, the Court held: "Fighting in the arena of the Club, as described in the record, is prize fighting. It is preceded by the training, the challenge, the attendance of seconds, or umpires, *and of surgeons* . . . all the attendant circumstances of a contest with naked hands." 47 La. Ann. 1095, 17 So. 599, 600.

In *Seville v. State*, 1892, S.Ct. Ohio, 30 N.E. 621, the defendant was indicted under a law making prize fighting a crime. He had engaged in a bout licensed by the local mayor as a "glove contest". The contest was allegedly held under Marquis of Queensberry rules, but two-ounce gloves were used and the fight was to the finish. The finish came in the 17th round when one of the contestants was battered until he was unconscious. He never recovered consciousness. The Court held that the "question for the jury to decide, was whether this combat was a prize fight, not what the Queensberry rules or any other rules called it, nor what name those accustomed to such combats have given it."

In the second *Olympic Club* decision and the *Seville* decision the Courts did not decide that the fights in question were outside the scope of "boxing exhibitions" or "glove contests"; they held that such contests were prize fights. Some courts, however, have held that the "word 'fight' implies a purpose to use violence for the purpose of inflicting injury", and it is for the jury "to determine whether the defendants in fact engaged in a fight, or merely in an innocent contest". *State v. Purtell*, 1896, 56 Kans. 479, 43 Pac. 782. The "innocent contest" in that case was described as a "lawful exhibition" and a "sparring contest", but it was fought under Queensberry rules, was scheduled for 25 rounds with the referee free to continue the fight for additional rounds, and it ended with a knock-out in the 22nd round. In *Purtell* as in the first *Olympic Club* case the Court was willing to describe the contests as "exhibitions". But there is no doubt that all of these so-called exhibitions were prize fights. In the trade and in the common parlance of 1895 a pugilistic exhibition or boxing exhibition included a personal encounter by blows under rules substantially similar to those that governed the Clay-Liston boxing contest.

By 1927 the only pugilistic exhibitions that existed were boxing matches, that is, fights or encounters between contestants wearing boxing gloves and fighting under Marquis of Queensberry rules. When the match was for money or when admission was charged, the exhibition was a prize fight. The 1927 amendment legalizes these boxing exhibitions, including prize fights, when they are held by and under the auspices of certain organizations.[13]

C. Related provisions of the Florida statute clearly show that prize fights are within the 1927 exception.

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[13]See footnote 3.

At the same time the exception was enacted the legislature adopted another proviso to Section 548.03. The proviso prohibited

> "prize fights . . . for a National or International Title".

In other words, prize fights for a state or local title and, indeed, all prize fights except those for a national or international title were legalized when held by the exempted organizations.

In 1951 the Florida legislature repealed the proviso relating to title bouts. In its place, the legislature substituted the following language:

> "Provided, further, that nothing contained herein shall be construed to prohibit any municipality from exercising its police powers to regulate *boxing* and wrestling *exhibitions* held under the auspices of the above named organizations. (Emphasis added.)

The undeniable effect of the repeal of the 1927 proviso was to legalize all prize fights, even title bouts—provided, of course, that the fight was held under proper auspices. This broad scale legitimation of prize fighting created the problem whether municipalities might continue to regulate, that is, prohibit or license fights. The object of the 1951 substitute was to reassure the municipalities that the state's legalizing prize fights was not intended to curtail the police power of local authorities. Thus, both the repeal of the 1927 proviso and the enactment of the 1951 proviso show legislative recognition of the legality of prize fighting sponsored by certain organizations.

Consistent with this view, the Florida legislature in 1957 enacted Section 548.04 requiring that a physician examine a "boxer's" physical condition before the boxer enters the ring. The section reads:

> "At any *boxing, sparring or wrestling match or exhibition permitted under § 548.03* there shall be in attendance a duly licensed physician, whose duty it shall be to observe the physical condition of the boxers or wrestlers and advise the referee or judges with regard thereto; any competent physician who has not had less than three years experience as a practitioner may be licensed. No *boxer or wrestler shall be permitted to enter the ring unless, not more than three hours before, a physician shall certify in writing that the boxer or wrestler is physically fit to engage in the proposed contest.* The physician's fee shall be paid by the licensee conducting the *match or exhibition.*" (Emphasis added.)

Section 548.04 does not limit itself to "exhibitions", but mentions "*match* or *exhibition*" in two places, refers to a "*contest*" in a third, and unquestionably applies to "a pugilistic exhibition, encounter, or fight." The substance and tone of the section belie the defendants' argument that the statute outlaws a "fight or encounter". Why a physician unless the "boxing . . . match or exhibition" exposes a boxer to the chance of receiving bodily injuries from blows exchanged in what may be an exhibition but is also a [prize] fight or encounter. As the Louisiana Supreme Court said in the second *Olympic Club* opinion, the presence of a physician (surgeon(is one of the indicia of a prize fight.[14]

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[14] 17 So. at 600.

The wording of Section 548.04 assumes that matches such as the Clay-Liston fight come within the "boxing exhibition" exception. Even if the exception were not originally intended to be that broad, it must be so read now; otherwise the two provisions of the statute would be in conflict. Of course, the conflicting provision which is last in time or last in order of arrangement prevails. *State v. City of Boca Raton*, 1965, 172 So.2d 230, 233. The requirement of a physician at boxing matches is both of these and its statutory purpose, if indeed a conflict exists, must control.

D. In the sports world, as everyone who reads the sports page knows, the inelegant fault of elegant variation is the rule. This rule carries over into legislation relating to sports. In Sections 548.01 and 548.03 the Florida legislature used "pugilistic exhibition, fight or encounter" to describe a prize fight. In Section 548.02, aided by a comma, "exhibition, fight, or encounter" became an "encounter or contest" and simply a "contest". In Section 548.04 the legislature uses interchangeably the words "exhibition", "contest", and "match". In spite of the variety of expression, the statute is clear.

The contract here refers to the boxers as "fighters" five times and refers twice to the Clay-Liston contest as a "fight". But nine times the contract calls the encounter a "boxing contest", three times a "contest", two or three times a "match" or "bout". On its face, therefore, the contract itself demonstrates that it is in harmony with the Florida legislature's use of the terms "pugilistic exhibition" and "boxing exhibition" to include "boxing contest".

* * *

Considering the wording of the Florida statute and its legislative history, we hold that a "prize fight" comes within the scope of the generic terms "pugilistic exhibition" and "boxing exhibition".

III.

The district court held that the contract was void because neither of the parties was or belonged to an approved sponsor listed in the statute, nor did the contract provide that the fight shall be held under the auspices of one of the exempted organizations. The district court apparently gave no effect to the amended complaint. The defendants argue that the amended complaint was properly dismissed, citing several circuit court cases in which complaints were dismissed because the allegations were in direct conflict with the contracts sought to be enforced. *Simmons v. Peavy-Welsh Lumber Co.*, 5 Cir. 1940, 113 F.2d 812; *Foshee v. Daoust Construction Co.*, 7 Cir. 1950, 185 F.2d 23; and *Consolidated Jewelers, Inc. v. Standard Financial Corp.*, 6 Cir. 1963, 325 F.2d 31. The principle of these cases does not apply to Inter-Continental's amended complaint, because that complaint in no way conflicts with the contract Inter-Continental seeks to enforce. Sponsorship of the fight by the Veterans of Foreign Wars is reconcilable with the contract even though the contract makes no mention of such sponsorship.

Schaal v. Race, Fla. App., 1961, 135 So.2d 252, urged by the defendants and cited by the district court, is not applicable. In that case, the plaintiff's original complaint alleged that the plaintiff had rendered advertising services for the defendant's political campaign under an oral contract with the defendant. Florida law required that all

remuneration for services rendered to a political campaign be authorized in writing by the campaign treasurer, and that a knowing violation of this provision was a misdemeanor. The plaintiff subsequently sought to amend his complaint by deleting the part referring to the political campaign. The court dismissed the amended complaint with prejudice, terming it a sham. The amended complaint, in effect, was a direct contradiction of the very facts alleged in the original complaint that had made the contract unenforceable. No such contradiction appears in Inter-Continentals amended complaint. The amendment is completely consistent with the facts alleged in the original complaint, and could as easily be an attempt to correct a legal oversight as a disingenuous effort to make the agreement conform to the law.

The statute requires only that the fight "be held by and under the auspices" of one of the approved groups. It does not require that the approved group be a signatory to every contract that relates to the fight. The absence of any mention of the Veterans of Foreign Wars in the contract between Inter-Continental and MacDonald is not inconsistent with the allegation that the Veterans of Foreign Wars ultimately sponsored the match. In a set of analogous cases, the courts have consistently held that if an act were illegal unless specifically approved by some governmental administrative authority, a contract to do that act would still be upheld even though the contract itself made no mention of the governmental approval. See *Lewis v. Davis*, 1947, 145 Texas 468, 199 S.W.2d 146 (registration under the Texas Securities Act);[15] *Nussen-*

[15]The parties entered a contract to form a partnership for engaging in the oil and gas business. Their projected business activities were illegal unless registered under the Texas Securities Act, and no such registration was mentioned in the contract.

baum v. Chambers & Chambers, 1948, 322 Mass. 419, 77 N.E.2d 780 (approval under the Federal Wage Stabilization Act);[16] *Pennsylvania State Shopping Plazas, Inc. v. Olive*, , 202 Va. 862, 120 S.E.2d 372 (performance of construction contract would violate zoning regulations but zoning variance possible to obtain);[17] *City of Richmond v. A. H. Ewing's Sons, Inc.*, 1960, 201 Va. 862, 114 S.E.2d 608 (zoning variance); *McNally v. Moser*, 1956, 210 Md. 127, 122 A.2d 555 (zoning variance); and *Adamsky v. Mendes*, 1950, 326 Mass. 602, 96 N.E.2d 236 (zoning variance). Several of these cases involved situations where the requisite administrative approval had not yet been received, much less mentioned in the contract. The policy even in those cases has been to hold the contract valid unless clearly invalid on its face.

> "Courts do not go out of their way to discover some illegal element in a contract or to impose hardship upon the parties beyond that which is necessary to uphold the policy of the law." *Nussenbaum v. Chambers & Chambers, supra* at .

This is not an executory contract. Inter-Continental has completely performed its part of the bargain. The potential injustice here is far greater than if neither

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[16]The plaintiff sought to enforce an employment contract which had not been approved by the competent federal authority under the Wage Stabilization Act of 1942, and no mention of obtaining such approval had been made in the contract.

[17]"There is authority that the obligor in a contract is excused from its performance when to perform would violate zoning regulations, but the rule is not applicable where, as in the present case, the zoning laws permit a variance in the regulations and some discretion may be exercised by the proper authorities in granting a permit for a proposed use". 120 S.E.2d 372, at 375.

side had performed and one of the parties were seeking to compel the other to do so. Also, the problems of proof here are far less difficult. If the contract were completely executory the question of fact would be one of intention—whether or not the parties at the time of the contract intended to hold the prize fight without the proper sponsorship in violation of the laws of Florida. In the present case the difficult question of intention is not present because the fight has already been held. The only question of fact is the far simpler one of whether the fight actually was held by and under the auspices of one of the approved groups. (Emphasis supplied)

Even without benefit of the amended complaint, the contract is not on its face unlawful. MacDonald's obligation under the contract "to stage and handle the live aspect of the promotion" should be construed to include the burden of making arrangements for a lawful fight. If there is any doubt as to what the parties meant, a trial should be had, not to contradict the contract but to show what the parties meant by their contract. The defendants should not be allowed to escape from a bad bargain simply because the contract at the time it was entered into was capable of both lawful and unlawful performance. In the circumstances of this case, illegality is an affirmative defense to be raised in the answer and proved by the defendants who bear the burden of proof on this issue. The defendants raised the issue prematurely in their motion to dismiss. The plaintiffs are entitled to their day in court. (We do not reach the question whether MacDonald *could* assert invalidity as a defense where he was the party responsible for failing to bring the contest within the statutory exemption.) (Emphasis supplied)

As for the motion to dismiss for failure to state a claim, this Court has said many times that such a motion "should not be granted unless it appears to a certainty that the plaintiff would be entitled to no relief under any state of facts which could be proved in support of his claim". *Richland Co. v. Harper*, 5 Cir. 1962, 302 F.2d 323, 325.

We hold that the district court erred in dismissing the complaint. We direct the court to grant the plaintiff's motion to amend its complaint. We REMAND the case for a trial on the merits consistent with this opinion.

REVERSED.

COLEMAN, Circuit Judge, dissenting:

I must respectfully dissent. I am of the opinion, as the District Judge held, that the contract for the prize fight was illegal on its face. This being a question of Florida law, which more appropriately could have been settled by the courts of that State, I shall refrain from further discussion.

APPENDIX C

No. 65-2-Civ-TC

FINDINGS OF FACT, CONCLUSIONS OF LAW, and FINAL JUDGMENT

THIS CAUSE came on for trial before the Court sitting without a jury, commencing on Tuesday, October 28, 1969, and the Court having duly considered the evidence therein and being fully advised in the premises, makes the following findings of fact and conclusions of law:

FINDINGS OF FACT

I.

This Court has jurisdiction of the parties and the subject matter of this cause. This case involves an action for damages in excess of $10,000 for the alleged breach of contract. It is a diversity of citizenship action. The plaintiff is a corporation duly organized and existing under the laws of the State of Pennsylvania, with its principal place of business in Chester, Pennsylvania.

William B. MacDonald, Jr., now deceased, was originally named as a party defendant in this cause and he was a resident of Dade County, Florida. Fred R. Baisden, one of the Executors of the Last Will and Testament of William B. MacDonald, Jr., is a resident of Dade County, Florida. The Miami Beach First National Bank is the other Executor of the Last Will and Testament of William B.

MacDonald, Jr., and is a national banking corporation duly organized and existing under the laws of the United States, with its principal place of business in Dade County, Florida. Both Executors have been duly substituted as defendants in the place and stead of William B. MacDonald, Jr. The defendant New Amsterdam Casualty Company is a New York corporation, having its principal place of business in either Baltimore, Maryland, or Hartford, Connecticut, and maintains an office in Dade County, Florida.

II.

On December 19, 1963, the plaintiff and the now deceased William B. MacDonald, Jr., entered into a contract which provided for the holding, conducting and staging of a championship bout between Sonny Liston, the world heavyweight champion, and Cassius Clay, the challenger, which was to be held at the Miami Beach Convention Hall in Miami Beach, Dade County, Florida, on Tuesday, February 25, 1964. The contract granted to MacDonald the right to stage and handle the live-gate aspect of the aforementioned boxing promotion. MacDonald agreed to pay $625,000 to Inter-Continental upon completion of the aforesaid boxing contest or within three days thereafter, namely, on March 1, 1964, in the event the live-gate receipts were less than $625,000.

Paragraph 8 of the contract provides that MacDonald will post a performance bond in the amount of $300,000 as partial security for the aforementioned amount. Such a bond was posted, with the defendant New Amsterdam Casualty Company named as surety.

Other pertinent portions of the contract provide as follows:

Paragraph 3 of the agreement between the parties obligated the plaintiff, Inter-Continental, at no cost to MacDonald, to furnish a guaranty bond in the sum of $100,000 to indemnify and make MacDonald whole against any loss as the result of either Liston or Clay or both being unable to engage in the boxing contest at the time and on the date aforesaid. Paragraph 3 also provides that the sum of $100,000, which was to be guaranteed by the mentioned performance bond, be paid over to MacDonald if either of the fighters "fail to appear and to fight" at the time provided.

Paragraph 11 of the agreement between the parties binds the plaintiff, Inter-Continental, to have Liston and Clay in Miami Beach, Florida, or within thirty miles thereof, using line-of-sight distance, at least three weeks prior to the staging of said boxing contest. It is also provided in that paragraph that both fighters shall co-operate and make themselves reasonably available without cost to MacDonald for promotional purposes.

Paragraph 14 of the agreement between the parties provides that "if for any reason it becomes necessary to postpone said boxing contest," all provisions of the agreement shall be extended for one week for the two specific dates of March 2 or March 3, 1964, and that if the bout could not be staged on those dates, the agreement was terminated and all parties released of all obligations thereunder, with the added proviso that MacDonald would in that event be entitled to the entire proceeds of the $100,000 bond called for in Paragraph 3 of the agreement.

III.

The case is at issue upon Plaintiff's amended complaint and the amendment thereto, Defendants' answer and amendment thereto, as the issues are stated in the pretrial stipulation entered into by counsel.

IV.

The plaintiff has carried its burden of establishing a prima facie case of breach of contract. The evidence introduced by the plaintiff established the existence of a contract, ~~lawful~~ on its face, the performance of all conditions precedent, and the failure of the defendants to satisfy their contractual obligations. Evidence was introduced to show that MacDonald had paid or caused to be paid to the plaintiffs the sum of $224,694.83; that there remained outstanding and unpaid by the defendants to the plaintiff the sum of $400,304.17, with interest from March 1, 1964. Demand was made upon the defendants but they have failed to pay the balance due.

V.

The defendant MacDonald, having invoked the provisions of §548.03, Florida Statutes, in aid of his contract with plaintiff, cannot now assert its unconstitutionality to escape the burdens of the contract.

VI.

In seeking to avoid liability under the contract in issue, the defendants have raised several issues of law and fact.

The defendants have adopted the position that the fight was not conducted in accordance with the provisions of Florida Statute §548.03. The statute, penal in nature, prohibits pugilistic exhibitions except when conducted by and under the auspices of various named organizations, including the Veterans of Foreign Wars. It was the obligation of the defendants under the contract between the parties to comply with the statute and otherwise to stage a lawful fight. While there is testimony which indicates that the fight was held under the auspices of the VFW, but not by the VFW, the defendants are estopped from asserting non-compliance with the statute. The Fifth Circuit Court of Appeals in its earlier decision in this case, stated that MacDonald had the obligation to conduct a lawful fight. The defendants therefore cannot assert as a defense their own failure to lawfully conduct the fight.

In addition, the last provision of §548.03, Florida Statutes, provides:

> "Provided further, that nothing contained herein shall be construed to prohibit any municipality from exercising its police powers to regulate boxing and wrestling exhibitions held under the auspices of the above-named organizations."

The evidence before the Court indicates that the municipality of Miami Beach exercised its police power in regulating this match and it was held under the auspices of the VFW Post No. 3559.

VII.

The defendants have also asserted that MacDonald was released from his contract obligation of paying the sum of $625,000 in consideration of his excusing the plaintiff's breaches of the contract, namely, Paragraphs 3 and 11 thereof, in order that the plaintiff could preserve and protect the valuable collateral contracts that it had outstanding and save the $100,000 that it might have owed MacDonald had the fight been cancelled.

The testimony on this point indicates that MacDonald was seriously considering withdrawing from his obligations under the contract and that he notified certain officers of the plaintiff corporation of his intentions. A meeting of the principals was held and Garland Cherry, the secretary of the plaintiff corporation, reassured MacDonald to the end that the fight be conducted as scheduled. The evidence before the Court establishes that while Cherry did assure MacDonald that MacDonald would not sustain any loss, this assurance related to actions the plaintiff corporation would take in the future in allowing MacDonald's participation in future promotions should there be a loss on the fight. All other testimony by those present at the meeting or immediately outside of the meeting room is vague as to how this assurance was to be accomplished.

The testimony of Alfred Vallone, MacDonald's chauffeur, that MacDonald said upon exiting the meeting room that the parties had reached an agreement that if the gate was a loss that the plaintiff corporation would make up the difference, is entitled to little weight or credibility. It is inherently unlikely that MacDonald would make such a statement to his chauffeur in the presence of the other

participants and that no one else who was there would have overheard the statement as testified to by Vallone.

Viewed in its totality the evidence before the Court indicates that the defendants have failed to carry their burden of establishing an oral modification of the formal written contract.

Since the Court has found that the fighters did appear and that there was no oral modification of the original agreement, it is not necessary to consider the allegation raised by the defendants that the plaintiff was in breach of the contract by failing to provide the $100,000 performance bond required by Paragraph 3 of the contract.

The defendants have not established that Paragraph 11 of the contract was breached.

The check from the City of Miami Beach, in the amount of $98,695.83 to the plaintiff, marked "Settlement in Full," evidences the closeout of the escrow fund held by the city and is not a defense to the discharge of defendants from their obligation under the contract.

CONCLUSIONS OF LAW

I.

The Court has jurisdiction of the subject matter and the parties to the cause.

II.

The contract between the parties from its operation did not accomplish an unlawful purpose and therefore is valid and enforceable.

III.

The contract between the parties was not modified and MacDonald was not released from his guaranty obligation.

IV.

The plaintiff has recovered from the defendants the sum of $224,695.83 and is entitled to recover the additional sum of $400,304.17, plus six (6%) per cent interest from March 1, 1964.

FINAL JUDGMENT

Accordingly, it is ORDERED and ADJUDGED that:

I.

The plaintiff, INTER-CONTINENTAL PROMOTIONS, INC., do have and recover of and from the defendants, THE MIAMI BEACH FIRST NATIONAL BANK and FRED R. BAISDEN, as Executors of the Last Will and Testament of William B. MacDonald, Jr., deceased, and NEW AMSTERDAM CASUALTY COMPANY, the sum of $400,304.17, plus $137,101.72 (interest at 6% from March 1, 1964 to November 15, 1969) or a total of $537,406.89.

II.

The plaintiff shall recover from the defendants named above its costs incurred in and about this action, to be taxed later.

DONE and ORDERED at Miami, Florida, this ____ day of November, 1969.

_____

United States District Judge

APPENDIX D

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 29404

INTER-CONTINENTAL PROMOTIONS, INC.,
Plaintiff-Appellee,

versus

THE MIAMI BEACH FIRST NATIONAL BANK and FRED R. BAISDEN, as Executors of the Last Will and Testament of William B. MacDonald, Jr., deceased, Etc.,
Defendants-Appellants.

Appeals from the United States District Court for the Southern District of Florida

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(April 9, 1971)

Before GEWIN, COLEMAN and AINSWORTH, Circuit Judges.

AINSWORTH, Circuit Judge: This Florida diversity matter is before us a second time. On the first occasion we reversed the District Judge, who granted defendants' motion to dismiss for failure to state a claim,

and remanded the case for trial on the merits. See *Inter-Continental Promotions, Inc. v. MacDonald*, 5 Cir., 1966, 367 F. 2d 293. Accordingly, a trial was held with a full development of the facts and circumstances of the case. This time the District Court (sitting without a jury) rendered judgment in favor of plaintiff.

This breach of contract action by Inter-Continental Promotions, Inc. against William B. MacDonald, Jr.[1] grows out of the world heavyweight championship fight between Charles "Sonny" Liston and Cassius Clay on February 25, 1964. Inter-Continental and MacDonald entered into a contract by which Inter-Continental agreed to produce Liston and Clay at the specified time and place in Miami Beach, Florida, where they would engage in the boxing contest.[2] In consideration of the payment of $625,000, payable upon the completion of the boxing contest, MacDonald was to receive the live gate proceeds. However, all ancillary rights, such as television, radio and movie rights, were retained by Inter-Continental. Under the contract MacDonald had "the right and obligation to promote said boxing contest in the manner he deems fit; to print and sell admission tickets thereto; to collect the proceeds of ticket sales; to arrange all seatings; to make whatever arrangements he deems necessary for the press; to pay all local, state, and federal taxes on admissions; to arrange and pay for the undercard preliminary fights; to pay all

[1]The complaint was originally brought against William B. MacDonald, Jr. and his surety, New Amsterdam Casualty Company. Upon the death of MacDonald, appellants, The Miami Beach First National Bank and Fred R. Baisden, as Executors of the Last Will and Testament of William B. MacDonald, Jr., were substituted in the place and stead of MacDonald and New Amsterdam Casualty Company.

[2]William B. MacDonald, Jr. subsequently assigned to Dundee-MacDonald Enterprises, Inc. his rights and duties under the contract.

fees and expenses of the controlling boxing commission; to advertise and promote said live gate; to make press releases; and, to do any and all things of that kind and nature reasonably necessary for the enhancement of said live gate." Arrangements were duly made and on February 25, 1964, Clay knocked out Liston and won the heavyweight championship of the world. The gate receipts of only $225,000, however, fell far short of MacDonald's expectations and the consideration he had agreed to pay for those rights. He turned over the gate receipts to Inter-Continental which then brought this suit for the balance.

Florida has declared a public policy forbidding the performance of prize fighting and pugilistic exhibitions for reward. This prohibition is contained in Florida Statutes Annotated § 548.01, a statute providing criminal penalties of a fine of not less than $2,500 nor more than $5,000, or imprisonment for not more than 5 years.[3] Section 548.03, however, excepts from the prohibition boxing exhibitions which are "held by and under the auspices of" certain named civic, educational and charitable organizations, including the Veterans of Foreign Wars, and further provides that "nothing contained herein shall be construed

[3]This section reads as follows:

"548.01 Prize fighting, pugilistic exhibitions; penalty.—

"Any person who shall voluntarily engage in any pugilistic exhibition, fight or encounter, with or without gloves, between man and man, or in an exhibition or fight between man and bull, or between man and any other animal, for money or anything of value, or upon the result of which any money or anything of value is to be collected, acquired, bet or wagered, to see which any admission fee is charged, directly or indirectly, shall be punished by a fine of not less than two thousand five hundred, nor more than five thousand dollars, or by imprisonment for not more than five years."

to prohibit any municipality from exercising its police powers to regulate boxing and wrestling exhibitions held under the auspices of the above named organizations."[4]

We remanded this case for a factual determination of "whether the fight actually was held by and under the auspices of one of the approved groups." 367 F. 2d at 303. The District Court held that it was so held, finding specifically "that the municipality of Miami Beach exercised its police power in regulating his match and it was held under the auspices of the VFW Post No. 3559." We do not agree, as the evidence is overwhelming to the contrary, and the Trial Judge's ruling is clearly erroneous. Fed. R. Civ. P. Rule 52(a).

In order to circumvent the prohibitory statute against the promotion of pugilistic exhibitions, it is apparent that

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[4]This section reads as follows:

"548.03 Pugilistic exhibition defined. —

"By the term 'Pugilistic exhibition, encounter or fight, with or without gloves,' as used in this chapter, is meant any voluntary fight or personal encounter, by blows, between two or more persons, for money, prize of any character, points, distinction or fame, or other thing of value, or upon the results of which any money or thing of value is bet or wagered, or for which an admission fee is charged, directly or indirectly; provided, that nothing contained herein or in any law or municipal regulation shall be construed as applying to boxing exhibitions held by and under the auspices of the American legion, disabled American veterans, veterans of foreign wars of the United States, Spanish-American war veterans or companies or detachments of the Florida national guard, Y.M.C.A., junior chamber of commerce, or any college which is a member of any recognized amateur athletic association and the Circulo Cabana club, a charitable organization now in existence, whether an admission fee is charged or not; provided further, that nothing contained herein shall be construed to prohibit any municipality from exercising its police powers to regulate boxing and wrestling exhibits held under the auspices of the above named organizations."

an arrangement was made to use the name of Veterans of Foreign Wars, Post 3559 of Miami, Florida, as sponsor of the fight. The consideration paid to the VFW for the use of their name was the nominal sum of $500 cash. Two members of VFW Post 3559 testified that approximately twenty of their members were in attendance on the night of the fight. The Secretary of the Miami Beach Boxing Commission testified that he knew that Dundee-MacDonald was the promoter of the fight but that he actually observed members of the VFW present and that their presence was necessary in order to make the boxing contest a legal venture under the laws of Florida. He also identified sample tickets for the fight on which are printed the words "Sponsored by V.F.W. Miami Beach Post No. 3559." The same witness testified that the Dundee-MacDonald Enterprises had applied for and been issued a license by the Boxing Commission to stage the championship fight.

The evidence is quite clear that the VFW had nothing whatsoever to do with holding, staging or conducting the contest and that the parties to the contract were well aware of that fact. Harold Conrad, a writer and fight promoter, who was public relations director for plaintiff, Inter-Continental, and also on-the-scene agent for Inter-Continental prelimi[illegible]ary to the fight actually taking place, acknowledged in ef[illegible]that the $500 paid to the VFW was a mere gratu[illegible]. The record discloses that he was asked, in that part of his deposition offered in evidence by defendants' counsel, as an admission against interest, the following:

"Q. Do you know what, if any, connection that organization had with this fight?

"A. Well, I think there was some kind of a handout that these guys had been having for years in this town. You can't put on a fight unless they are at the door. I don't know what the details are. I have seen them down through the years."

The Chairman of VFW Post 3559 Boxing and Wrestling Committee, Max Lenchner, testified that VFW had nothing to do with staging the fight. He said that he was told by Mr. Dundee, "We are having a fight next week, Max. Be here with the men." And Lenchner said, "That's the way it is." He further said the check for $500 was received by him, which was paid "for the use of its name in sponsorship of the fight." Then he was asked:

"Q. Now, you had nothing whatever to do with putting on this fight, did you?
"A. That's right. I have nothing to do with it whatsoever.

"Q. Neither did the Veterans of Foreign Wars?
"A. That's correct."

Benjamin Peiser, a member of the VFW Post Committee, who attended the fight and remained at the doorway in order to keep out unauthorized people, testified that the $500 check paid to the Post "was given to our organization for attending that fight." He said he had nothing to do with the taking of tickets, however, and that neither he nor the VFW in any way contributed to staging, holding, conducting or putting on the fight.

Frank Lewis, who was an officer and member of the board of directors of all of the MacDonald Corporations and comptroller of MacDonald, testified that VFW Post 3559 had nothing to do with holding, staging or conducting the Liston-Clay fight. He said:

"Q. And in your capacity as treasurer of the corporation you participated in the negotiation of all of the phases of holding this fight as you just described, is that correct?
"A. Yes, definitely.

"Q. What, if anything, did the Veterans of Foreign Wars, Post 3559, have to do with holding, staging or conducting the Liston-Clay fight that was held on February 25, 1964?
"A. Nothing. We used their name and paid them a contribution for that.

"Q. Do you remember how much the contribution was?
"A. Yes, $500. This was arranged for by Chris Dundee and we paid it, Dundee-MacDonald Enterprises, Inc."

Lewis also testified that "everybody was trying to get into the fight free" and so he restricted the number of people from the Veterans of Foreign Wars which had submitted a list of over thirty names to an authorization of twenty only.

Oscar Markovich, who handled the vending concessions at the Liston-Clay fight at Miami Beach, and who has been at many fights at the Convention Hall as refreshment concessionaire, also testified that the VFW Post had nothing to do with staging the fight. He said:

"Q. Were there Veterans of Foreign Wars present at the fight?
"A. Yes, there was.

"Q. Isn't it a fact that they perform no function other than being present, sir?
"A. I have never seen them perform any functions but I have seen them there.

"Q. They are just merely present?
"A. So far as I can see.

"Q. They don't take tickets?
"A. No, sir.

"Q. They don't usher people to seats?
"A. No, sir.

"Q. And they don't have anything to do with any refreshment concessions?
"A. Nothing whatsoever.

"Q. And they have nothing to do with brining [sic] [bringing] the fight to the auditorium or staging it, that you know of?
"A. No, sir."

The record further shows that MacDonald (or Dundee-MacDonald Enterprises, Inc.) performed all the necessary acts requisite to promoting and staging the fight. They leased the convention hall, worked out arrangements with crowd-control and seating engineers, employed firms to take care of publicity and advertising, contracted for the printing of tickets and programs, and actively handled

every facet of promoting and conducting the fight. The conclusion is inescapable that the Lison-Clay fight was not held under the auspices of the VFW. The use of the organization's name was a mere fiction to avoid the prohibitory Florida statute, and representation on the printed tickets of VFW sponsorship was an obvious subterfuge designed to present a nominal compliance with the Florida law.

A second issue before us is the finding by the District Court that inasmuch as MacDonald had the obligation of conducting a lawful fight under the contract, defendants were estopped from asserting noncompliance with the exclusion clause of Florida Statutes Annotated § 548.03.

The law of Florida is to the contrary. The Supreme Court of Florida, in Montsdoca v. Highlands Bank & Trust Co., 1923, 95 So. 666, 668, said: "The doctrines of estoppel and waiver do not in general apply in transactions they are forbidden by statute or that are contrary to public policy." We cited Montsdoca and used the quoted language with approval in Northwestern National Casualty Company v. McNulty, 5 Cir., 1962, 307 F. 2d 432, 442-443. See also State v. City of Hialeah, Fla. App. 1963, 156 So. 2d 675, 676, reiterating the non-applicability of the doctrine of estoppel to transactions either forbidden by statute or contrary to public policy. The rule applies regardless of whether the party asserting the invalidity of the contract is himself a participant in the wrongdoing.[5] In

[5]See also Citizens' Bank & Trust Co. v. Mabry, Fla., 1931, 136 So. 714, 717; Robert G. Lassiter & Co. v. Taylor, Fla., 1930, 128 So. 14, 19; LeJohn Manufacturing Company v. Webb, D. C. Cir., 1955, 222 F. 2d 48, 52; National Transformer Corp. v. France Mfg. Co., 6 Cir., 1954, 215 F. 2d 343, 361; Standard Lumber Co. v. Butler Ice Co., 3 Cir., 1906, 146 F. 359, 362.

Local No. 234, Etc. v. Henley & Beckwith, Inc., Fla., 1953, 66 So. 2d 818, 823, the Supreme Court of Florida said:

> "The cases are legion that a contract against public policy may not be made the basis of any action either in law or in equity . . . .
>
> "Agreements in violation of public policy are void because they have no legal sanction and establish no legitimate bond between the parties. Brumby v. City of Clearwater, supra. Because of this the defendant may assert the invalidity of the contract even though he is a participator in the wrong. This is so for the reason that one who has entered into a contract or undertaking which is violative of public policy owes to the public the continuing duty of withdrawing from such an agreement." (Emphasis supplied.)

It has also been said that illegality of a contract as a defense is allowed not to protect the defendant but as a disability to the plaintiff. National Transformer Corp. v. France Mfg. Co., 6 Cir., 1954, 215 F. 2d 343, 361; Roberts v. Criss, 2 Cir., 1920, 266 F. 296. The evidence shows that the parties, pursuant to their contract, accomplished an unlawful purpose by virtue of an apparent subterfuge. Under the circumstances, the law will leave the parties where it finds them, and no relief shall be granted because of the dominant public interest. See National Transformer Corp. v. France Mfg. Co., supra at 361. Cf. Twin City Pipe Line Co. v. Harding Glass Co., 283 U. S. 353, 357, 51 S. Ct. 476, 477; Steele v. Drummond, 275 U. S. 199, 207, 48 S. Ct. 53, 55 (1927).

REVERSED.

APPENDIX E

AGREEMENT

THIS AGREEMENT, Made and entered into between INTER-CONTINENTAL PROMOTIONS, INC., a Corporation organized and existing under the laws of the State of Pennsylvania, and having a principal office at 407 Market Street, Chester, Delaware County, Pennsylvania, (hereinafter called Inter-Continental"), and WILLIAM B. MacDONALD, JR., of 9553 Harding Avenue, Trevi Building, Miami Beach 54, Florida, (hereinafter called "MacDonald").

WHEREAS, Inter-Continental has an exclusive contract with Charles "Sonny" Liston, Heavyweight Boxing Champion of the World, and Cassius M. Clay, Jr., number one contender, for the staging of a Heavyweight Championship Bout between Liston and Clay between January 20, 1964, and April 15, 1964; and

WHEREAS, Inter-Continental and MacDonald have negotiated and agreed that MacDonald shall stage and handle the live gate aspect of said promotion;

NOW, THEREFORE, in consideration of the mutual promises and other considerations herein contained, it is agreed as follows:

1. Inter-Continental hereby agrees to produce Charles "Sonny" Liston and Cassius M. Clay, Jr., on Tuesday, February 25, 1964, at an hour to be named, at the Miami Beach Convention Hall in Miami Beach, Florida, where they will then and there engage in a boxing contest

with each other, for fifteen rounds or less, for the Heavyweight Boxing Championship of the World.

2. MacDonald shall have the right and obligation to promote said boxing contest in the manner he deems fit; to print and sell admission tickets thereto; to collect the proceeds of ticket sales; to arrange all seatings; to make whatever arrangements he deems necessary for the press; to pay all local, state, and federal taxes on admissions; to arrange and pay for the undercard preliminary fights; to pay all fees and expenses of the controlling boxing commission; to advertise and promote said live gate; to make press releases; and, to do any and all things of that kind and nature reasonably necessary for the enhancement of said live gate.

3. Within ten days of date of this agreement Inter-Continental, at no expense to MacDonald, agrees to furnish a guarantee bond or non-appearance insurance in the principal sum of One Hundred Thousand Dollars ($100,000.00) in such form and with such company as shall be satisfactory to MacDonald, for the purpose of indemnifying and making MacDonald whole against any losses occurring as the result of either Liston or Clay, or both, being unable to engage in the said contest at the date and time aforesaid, or on any mutually agreed postponed date thereafter as hereinafter provided. Said $100,000.00 shall be paid over in its entirety if either of said fighters fail to appear and to fight at the agreed time as herein provided.

4. Inter-Continental agrees to indemnify and save MacDonald harmless from any and all claims, demands, actions and/or suits, by either Clay or Liston, or both, with respect to the fighters' share of the live gate receipts.

5. Inter-Continental agrees to cooperate with MacDonald by blacking out from closed circuit television for an airline distance of 250 miles from Miami Beach in the Florida peninsula so as not to unreasonably compete with the live gate promotion.

6. MacDonald shall be responsible and liable for all expenses in connection with the promotion of said live gate; however, it is specifically agreed that MacDonald shall not be responsible or liable to either Liston or Clay for their compensation for participating in said boxing contest, or for any training camp or other expenses incurred by either Liston or Clay, or both.

7. For and in consideration of Inter-Continental's sale of said live gate rights to MacDonald, MacDonald agrees to pay Inter-Continental the sum of Six Hundred Twenty-five Thousand Dollars ($625,000.00); said sum shall be due and payable upon the completion of the aforesaid boxing contest, but MacDonald shall have twenty-four (24) hours, thereafter, to pay said sum, provided the live gate receipts less taxes exceeds $625,000.00. If the live gate receipts, less taxes, are less than $625,000.00, then all of the such live gate receipts, less taxes, shall be paid over within twenty-four hours and MacDonald shall have a further period of Seventy-two hours in which to pay the balance of said $625,000.00.

8. As security for said payment of Six Hundred Twenty-Six Thousand Dollars ($625,000.00), MacDonald agrees to post a performance bond, satisfactory to Inter-Continental, in the amount of Three Hundred Thousand Dollars ($300,000.00); as further security for said payment

of Six Hundred Twenty-five Thousand Dollars ($625,000.00), MacDonald agrees to deposit, daily, and within twenty-four (24) hours of receipt, seventy-five percent (75%) of all sums after taxes received from the advance sale of tickets to said boxing contest, said deposits to be made in an escrow account in a bank in Dade County in the name of himself, Inter-Continental, and only if necessary, the City of Miami Beach; in no event shall MacDonald be required to deposit more than a total of Six Hundred Twenty-five Thousand Dollars ($625,000.00) in said escrow account. One-third of the premium on said performance bond, in the amount of Three Hundred Thousand Dollars ($300,000.00), shall be paid for by MacDonald, and the balance of said premium (not to exceed Twenty-five Hundred Dollars ($2,500.00) shall be paid for by Inter-Continental.

9. MacDonald agrees to indemnify and save harmless Inter-Continental from any and all liability arising out of the acts of neglect of himself, his agents, servants, employees, or independent contractors, or from any other liability arising out of the staging of said live gate promotion.

10. Inter-Continental, Liston, Clay and the Louisville Sponsoring Group, or any of them, shall have the right to audit the books and records of MacDonald to determine the gross receipts from the sales of admission tickets to said contest; this paragraph shall not be construed to permit such audit once the aforesaid escrow account has reached a total of Six Hundred Twenty-five Thousand Dollars ($625,000.00).

11. Inter-Continental agrees to have Liston and Clay in Miami Beach, Florida, or within thirty (30) miles thereof (using line of sight distance) at least three (3) weeks prior to the staging of said boxing contest, and further agrees that both of said fighters shall make themselves reasonably available without cost to MacDonald for promotional purposes during said period of time, having due consideration to the obligation of said fighters to train in preparation for said contest.

12. Inter-Continental retains all rights for the promotion, sale and exploitation of all ancillary rights to said boxing contest including, but not limited to television, radio, and movie rights from said match, except program rights to the fight at Miami Beach Convention Hall, which are reserved to MacDonald.

13. Inter-Continental, at no expense to MacDonald, agrees to make preparations and arrangements for the installation of platforms, staging, lines, and other equipment necessary for:

(a) Televising said bout to closed circuit television audiences throughout the world;

(b) Broadcasting said bout by radio throughout the world;

(c) Filming of the movies for showing throughout the world.

MacDonald agrees to cooperate, without cost to him, in such preparations. No such installations shall interfere with the seating or viewing of the live gate spectators.

14. If for any reason it becomes necessary to postpone said boxing contest, it is agreed that all promises, covenants, and conditions herein agreed shall be extended to include the dates of March 2 or March 3, 1964; in the event said bout cannot be staged on either of those dates, this agreement shall terminate, and all parties shall be relieved from all further obligations hereunder; provided, however, MacDonald shall be entitled to the proceeds of the aforesaid $100,000.00 appearance bond or insurance referred to in Paragraph Three above.

15. It is agreed that Inter-Continental shall receive the net sum of Six Hundred Twenty-five Thousand Dollars ($625,000.00) from MacDonald and shall have no liability for any expenses incurred in connection with the promotion of said live gate, except for the payment of the fighters and the payment of two-thirds (2/3) of the premium (not to exceed Twenty-five Hundred Dollars ($2,500.00) of the $300,000.00 bond and all cost for the non-appearance bond or insurance referred to above; each fighter shall bear his own training camp expenses.

16. Inter-Continental and/or MacDonald or both, may assign this agreement to another person, partnership, or corporation, as either or both may choose, but in such event, it is specifically agreed that both Inter-Continental and MacDonald shall each remain fully liable to the other for the full performance of all the conditions, covenants, and promises contained in this agreement.

IN WITNESS WHEREOF, the parties hereto have set their hands and seals, this 19th day of December A.D. 1963.

Signed, sealed and delivered
in the presence of:

/s/ Signature Illegible

(As to MacDonald)

/s/ Signature Illegible

(As to Inter-Continental)

/s/ William B. MacDonald, Jr. (SEAL)

William B. MacDonald, Jr.

INTER-CONTINENTAL
PROMOTIONS, INC.

By /s/ Signature Illegible

Attest: _____

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1971

No. 71-19

INTERCONTINENTAL PROMOTIONS, INC.,
Petitioner,

vs.

MIAMI BEACH FIRST NATIONAL BANK, and FRED R. BAISDEN, as executors of the Last Will and Testament of W. B. McDONALD, JR., deceased, and NEW AMSTERDAM CASUALTY CO.,
Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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A Writ of Certiorari Should Not Issue to Review a Decision of a United States Court of Appeals, on the Second Appearance of That Cause in the Appellate Court, under the Federal Doctrine of Abstention, Where the Supreme Court of the United States Had Previously, on Petition for a Writ of Certiorari Directed to the First Appellate Decision, Declined to Apply the Abstention Doctrine to This Litigation; and Where, on the Second Appeal, the United States Court of Appeals Adhered to Its Prior Decision, Without Initially Construing, Interpreting or Invalidating Any State Statute or Part Thereof, and Applied State Law That Was Not Uncertain, in a Diversity of Citizenship Action, to the Facts of the Case and Held That the Trial Court Erred in Factually Deciding the Specific Issue of Fact, for the Trial of Which the Cause Had Been Remanded on the First Appeal 25

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Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

PREFACE

This case arises out of the United States District Court, in and for the Southern District of Florida, Miami Division, and was instituted by the Petitioner, INTERCONTINENTAL PROMOTIONS, INC., as a diversity of citizenship action, for the alleged breach of a contract between itself and WILLIAM B. MacDONALD, JR., for the staging, con-

ducting, handling and holding of a public pugilistic exhibition for reward to determine the heavyweight champion of the world between SONNY LISTON, the then champion, and CASSIUS CLAY, the then Number One contender, which was actually held in Miami Beach, Dade County, Florida, on February 25, 1964. The Respondents, THE MIAMI BEACH FIRST NATIONAL BANK and FRED R. BAISDEN, as executors of the Last Will and Testament of WILLIAM B. MacDONALD, JR., deceased, were substituted in the place and stead of WILLIAM B. MacDONALD, JR. (who died during the pendency of this litigation), and NEW AMSTERDAM CASUALTY COMPANY, were the defendants in the trial court.

The Petitioner's skimpy presentation of the "Opinions Below" and the statement of the case are replete with omissions and inaccuracies and presented in a fashion to create the superficial impression that the Supreme Court of the United States ought to take jurisdiction of this cause, after final disposition in the United States Court of Appeals for the Fifth Circuit, on its second appearance in that Court, in order to now implement the Federal doctrine of abstention in deference to a state court adjudication of a state legal issue in avoidance of the determination of a Federal question; and to reconcile alleged conflict between the two (2) appellate court decisions in this same litigation. A full and complete presentation of the history and facts of this case is necessary and will demonstrate the following:

A. That the doctrine of abstention by the Federal judiciary is inapplicable in this diversity of citizenship action instituted by the Petitioner, who now, at the eleventh (11th) hour, after having originally selected the Federal system in which to litigate its cause, urges deference to the state courts, where there is no underlying Federal ques-

tion which will be avoided by such action. The Petitioner's position, upon scrutiny, demands an extension of the abstention doctrine to every diversity of citizenship case instituted in a United States District Court, governed by *Erie R. Co.* v. *Tompkins*, 304 US 64, 58 S.Ct. 817; so that all United States Courts of Appeals will become intermediary appellate tribunals functioning as way-stations on the ultimate journey to the Supreme Court of the United States, which would be required to exercise supervisory jurisdiction and review every case in order to guarantee that in diversity of citizenship actions state law was duly applied, notwithstanding the absence of any underlying Federal or constitutional issue. Additionally, it will be seen that in the history of this case if the abstention doctrine were to have been appropriately applied, the time to have done so would have been on the first appearance of this cause in the Supreme Court of the United States, on a petition for the issuance of a writ of certiorari from the first decision of the United States Court of Appeals for the Fifth Circuit, which was entitled *Inter-Continental Promotions, Inc.* v. *MacDonald*, 367 F. 2d 293 (5th Cir., 1966), cert. den., 393 US 834, 89 S.Ct. 105 (case No. 3).

B. The United States Court of Appeals for the Fifth Circuit, in the decision rendered on the second (2nd) appeal, did not overrule its prior decision rendered on the first (1st) appeal; and did not in any way whatever invalidate any portion of the applicable state statutes. On the first appeal, the state statute was interpreted, and after certiorari was denied by the Supreme Court of the United States, the cause was remanded for trial of a specific issue of fact. On the second appeal, the United States Court of Appeals for the Fifth Circuit decided that the evidence was overwhelming on the issue of fact for which the case had been remanded to the trial court, and that

the trial court's ruling on the evidence was clearly erroneous, in violation of Federal Civil Procedure Rule 52(a). Moreover, this being a diversity of citizenship case, the applicable law of the State of Florida pertaining to the doctrine of the law of the case would have authorized the appellate court, had it been so inclined, to overrule its earlier decision.

FLORIDA STATUTES INVOLVED

The Florida Statute involved in this case is Chapter 548 entitled "Pugilistic Exhibitions", and is comprised of four (4) sections, namely, Florida Statutes, Chapter 548.01-548.04. These provisions are somewhat lengthy and, therefore, rather than set them out in full in the body of this brief, their text is set forth in the Appendix to this brief.

HISTORY OF THE CASE

A. Procedural History of the Case from Its Inception Up Through and Including the Institution of the Second (2nd) Appeal.

The procedural history of this case began with the filing of the original complaint on January 4, 1965. (R 1-10) On January 25, 1965, the Respondents (as Defendants below), moved to dismiss the complaint (R 12), on the dual ground that it did not state a cause of action and that the contract sought to be enforced was illegal. On January 28, 1965, the Petitioner (Plaintiff below) moved to amend the complaint (R 16-18), and insert the following paragraph (R 17):

> "Said contract concerned the holding and conducting of a pugilistic contest which was to be held on February 25, 1964, between Charles 'Sonny' Liston and Cassius M. Clay, Jr. *Said contest was held by and*

> *under the auspices of the Veterans of Foreign Wars of the United States* and was licensed and/or permitted by the City of Miami Beach, Florida, as a pugilistic exhibition held under the auspices of the Veterans of Foreign Wars of the United States. In this connection, plaintiff specially pleads Florida Statutes Annotated Section 548.03 as being the statutory basis for (a) the legal holding and conducting of said pugilistic encounter, and (b) the legality of said contract." (Emphasis supplied)

On April 17, 1965, the trial court entered an "Order of Dismissal". (R 112-114) In that order, the trial court concluded that pugilistic exhibitions for reward were condemned as a felony in the State of Florida, carrying a penalty of up to $5,000.00 or imprisonment for not more than five (5) years (Florida Statutes, Chapter 548.01). Under an amendatory provision to that Act, namely, Florida Statutes, Chapter 548.03, pugilistic exhibitions for reward are permissible if "held by and under the auspices of" one of the named organizations, among which is the VFW. The trial court held that the contract between the parties was to conduct a public display of pugilism for reward between parties not embraced within the exemption contained in the amendatory provision of the Act, and that such contract was illegal and unenforceable. That order of dismissal was appealed to the United States Court of Appeals for the Fifth Circuit and reversed. *Inter-Continental Promotions, Inc.* v. *MacDonald*, 367 F. 2d 293 (5th Cir., 1966). The following four (4) matters of significance were decided on that first appeal:

1. That there is no doubt that a contract to perform an illegal act is void and will not be enforced in Florida courts.

2. That the Florida legislation "prohibits one thing—public displays of pugilism for reward". (367 F. 2d at 297)

3. That on remand, the "only question of fact is the far simpler one of whether the fight *actually* was held by and under the auspices of one of the approved groups". (Emphasis added) (367 F. 2d at 303)

4. That the trial court, in rendering the initial decision that the contract was void because neither of the parties was an exempt entity listed in the amendatory provision of the Statute (Section 548.03), and the contract did not provide that the fight shall be held by one of those organizations, gave no effect to the amended complaint. (367 F. 2d at 301-302)

The Defendants-Appellees (Respondents in this Court) filed a timely petition for rehearing which pended until the same was denied on May 8, 1968. It is at this juncture where the Petitioner overlooked and failed to call attention to the fact in its presently pending petition for a writ of certiorari, that such a petition was heretofore filed in the Supreme Court of the United States, by the now-Respondents, in the October Term of 1968, which was assigned Case Number 1526. In that petition for a writ of certiorari it was asserted that the initial decision of the United States Court of Appeals for the Fifth Circuit passed on questions of state law which, under the Federal doctrine of abstention, should more appropriately have been decided by State courts. The Petitioner in this proceeding relies heavily upon the case of *United Gas Pipe Line Co.* v. *Ideal Cement Co.*, 369 US 134, 82 S.Ct. 676; however, when it was respondent, when this case first appeared in the Supreme Court of the United States, it stated on page 6 of its "Brief of Respondent":

". . . The case sub judice and UNITED GAS PIPE LINE CO. v. IDEAL CEMENT CO., are not analogous on the facts nor do they pose analogous points of law."

On October 14, 1968, certiorari was denied. See: *The Miami Beach First National Bank and Fred R. Baisden,*

as Executors, etc., et al., Petitioners, v. *Inter-Continental Promotions, Inc.,* 393 US 834, 89 S.Ct. 105 (case #3). It would appear that it was at that stage of the proceedings, when this case first appeared in the Supreme Court of the United States, after the United States Court of Appeals for the Fifth Circuit first interpreted and decided the applicability of Florida Statutes, Chapter 548 to the contract sought to be enforced in this diversity of citizenship action, that the doctrine of Federal abstention should have been applied, if it was ever going to be applied to this litigation. As noted, that was the point raised and the Supreme Court of the United States denied certiorari.

On remand of this cause to the trial court, on January 22, 1969, an order on the mandate was entered (R 146), granting the Plaintiff's motion to amend its complaint and allowing the amended complaint to be filed within ten (10) days. On January 31, 1969, the Plaintiff filed its amended complaint. (R 147-150) The Plaintiff (the Petitioner in this Court) alleged, inter alia, that the subject matter of the contract which it sought to enforce was the holding and conducting of a pugilistic contest which was held under the auspices of one of the organizations named in Florida Statutes, Chapter 548.03 (Paragraph 4 of the amended complaint—R 148). On March 5, 1969, the Defendants filed their answer (R 159-161), and in answering Paragraph 4 of the complaint, specifically denied that the contract provided that the prize fight was to be conducted or held by and under the auspices of any organization, much less one of those named in Florida Statutes, Chapter 548.03, and, further, denied that the subject prize fight was actually held by and under the auspices of any organization, much less one of those named in the aforementioned Statute.

This cause was tried non-jury, commencing on October 28, 1969, and was concluded on October 30, 1969. (TR 1-494) On November 18, 1969, the trial court entered its "Findings of Fact, Conclusions of Law and Final Judgment". (R 725-730) Regarding the trial court's findings, it is legally and factually pertinent to note that the trial court specifically found that the applicable statute was penal in nature and prohibited pugilistic exhibitions except "when conducted by and under the auspices of various named organizations, including the Veterans of Foreign Wars", and that "there is testimony which indicates that the fight was held under the auspices of the VFW, but not by the VFW". (R 728) Thereafter, on November 28, 1969, the Defendants filed their post-trial motions (R 732-740) and, inter alia, asserted the following:

> 1. That the Court erred in not dismissing the Plaintiff's case on the ground that the uncontradicted evidence established that the contract between the parties accomplished an unlawful purpose, namely, a public display of pugilism for reward, contrary to and in violation of Florida Statutes, Chapter 548, in that, the LISTON-CLAY fight held in Miami Beach, Dade County, Florida, on February 25, 1964, was not held by and under the auspices of any of the exempted organizations named in Section 548.03.
>
> 2. That the court overlooked and failed to consider that the contract between the parties was impossible of legal performance, in that, neither of the parties was qualified to, nor could either hold and conduct a public display of pugilism for reward in the State of Florida.
>
> 3. That the court's findings failed to include an express finding based on the uncontradicted evidence that the fight between LISTON and CLAY held on February 25, 1964, in Miami Beach, Florida, was a public display of pugilism for reward which was not

held by and under the auspices of any of the named organizations in Florida Statutes, Chapter 548.03.

4. That the Conclusion of Law numbered 2 was clearly erroneous because the uncontradicted evidence established that the contract between the parties, from its operation, accomplished an unlawful purpose and that such contract was, therefore, invalid and unenforceable.

On January 2, 1970, the trial court denied the post-trial motions that asserted, inter alia, the grounds specified above.

On January 28, 1970, the Defendants instituted the second appeal and thereafter duly perfected that appeal.

B. The Facts Established at Trial

This statement of facts is based solely upon undisputed facts or those testified to by the Plaintiff (Petitioner), its duly authorized representatives or its witnesses, and will be related in strict accordance with the record in a light most favorable to the Petitioner.

SONNY LISTON, the World Heavyweight Champion, met CASSIUS CLAY, the Contender, in the Miami Beach Convention Hall, located in Miami Beach, Dade County, Florida, on February 25, 1964, and engaged in a public display of pugilism for reward. That fight, according to HAROLD CONRAD, the Petitioner's representative on the local scene in Miami Beach, Florida, had the second largest monetary gross of any fight in history, namely, $4,200,000.00. (TR 360) According to the sworn testimony of GARLAND D. CHERRY, Attorney for, Secretary of, and a member of the Board of Directors of the Petitioner-corporation (TR 43), the fighters received $1,050,000.00. (TR 464-465)

The background, which wholly excludes any possibility that the subject fight was held by and under the auspices of the VFW, began to unravel on July 5, 1962, when JAMES and ROBERT NILON entered into a contract with CHARLES "SONNY" LISTON to form the Petitioner-corporation and provide that SONNY LISTON would own fifty (50%) percent of the stock of that corporation and fight exclusively for the Plaintiff. (DX 1 ident.) On November 5, 1963, the Petitioner entered into a contract with LISTON, CLAY and what is known as the LOUISVILLE SPONSORING GROUP (a joint venture owning CLAY's right to fight), by virtue of which it was agreed that LISTON and CLAY would engage in a boxing match for the heavyweight boxing championship of the world to be staged no earlier than January 20, 1964, and no later than April 15, 1964. (DX 3 ident.) Paragraph 1 on page 2 of that contract provides as follows:

> ". . . said match to be promoted by Inter-Continental or its nominee . . . Said match shall be conducted in all respects in conformity with the laws of the state and city wherein said match is held. . . ."

Paragraph 2 of that contract provides:

> "Inter-Continental, or its nominee, shall promote the match—. . . The match shall be conducted in accordance with the laws of the city and state wherein said bout is to be held, as well as all of the applicable rules and regulations of said city and state, 'athletic commission', and any other federal, state or local governmental body having jurisdiction thereof. . . ."

Paragraph 10 of that agreement provides:

> "In the event Inter-Continental deems it necessary or desirable to use a nominee, it nevertheless warrants, represents and agrees that it will remain solely responsible and liable to Liston, Clay and LSG for the

performance of all covenants, promises, payments, performances, and conditions undertaken by it and contained in this Agreement."

One week earlier, on October 29, 1963, the same parties entered into a so-called re-match contract conferring on the Petitioner-corporation, for the sum of $50,000.00, the sole and exclusive right to promote CLAY's next fight in the event he beat LISTON and became the heavyweight champion of the world. (DX 2 ident.) The contracts entered into prior to the contract of December 19, 1963, between the parties to this litigation, set the stage for the holding of a world championship prize fight, in which SONNY LISTON, the World Champion, owned fifty (50%) percent of the Petitioner-corporation, which owned the sole and exclusive right to promote CLAY's next fight if he became world champion, with an express obligation imposed on the Petitioner-corporation to conduct a lawful fight in accordance with the law of the place where the fight was to be held.

With the stage thus set, as stated above, on December 19, 1963, the Petitioner-corporation entered into the agreement (PX 1) with WILLIAM B. MacDONALD, JR., by virtue of which MacDONALD, for the price of $625,000.00 was sold the right to stage the "live gate" aspect of the LISTON-CLAY fight to be held on February 25, 1964, at the Miami Beach Convention Hall, in Miami Beach, Florida. Under Paragraph 1 of that contract, the Petitioner obligated itself to produce LISTON and CLAY at the appointed time and place in order that "they will then and there engage in a boxing contest with each other, for fifteen rounds or less, for the Heavyweight Boxing Championship of the world." It will be seen that under the contract between the parties, each, every and all requirements for actually holding the fight were undertaken respectively by

the parties to the contract. Under Paragraph 2 of the agreement, MacDONALD undertook to print and sell admission tickets, collect the proceeds of ticket sales, arrange all seating, make necessary arrangements for the press, pay all local, state and federal taxes on admissions, arrange and pay for the undercard preliminary fights, pay all fees and expenses of the controlling boxing commission, advertise and promote the live gate, make press releases, and do any and all things reasonably necessary for the enhancement of the live gate. Paragraph 6 of the contract imposed the liability on MacDONALD for all expenses in connection with the promotion of the live gate, but specifically excluded any liability by MacDONALD to either LISTON or CLAY for their compensation for participating in the match or for any training camp or other expenses incurred by the fighters. Under Paragraph 12 of the contract, the Petitioner, INTER-CONTINENTAL, retained all ancillary rights for the promotion, sale and exploitation of the match, including but not limited to radio, television and movie rights. Under that provision, program rights to the fight at the Miami Beach Convention Hall were reserved to MacDONALD. Under Paragraph 13 of the contract, the Petitioner, INTER-CONTINENTAL, was obligated to make the preparations and arrangements for the installation of platforms, staging, lines, and other equipment required for televising, broadcasting and filming the fight. It is undisputed that these contract provisions imposed upon the parties the sole and exclusive duties and obligations to stage, hold and conduct the fight. The contract is conspicuously silent in regard to the fight being held by and under the auspices of any organization named in Florida Statutes, Chapter 548.03. By its very terms, the contract excludes anyone other than the parties from actually holding the fight.

At the trial, the Petitioner called four (4) witnesses on its case in chief, namely, W. BILL GLICK, Executive Secretary of the Boxing Commission of the City of Miami Beach (TR 31-42), GARLAND D. CHERRY, Secretary of the Petitioner-corporation, its Attorney and a member of its Board of Directors (TR 42-112), MAX LENCHNER, Chairman of the VFW Post 3559 Boxing and Wrestling Committee (TR 115-122), and BENJAMIN PEISER, a member of VFW Post 3559. GLICK testified that, as Executive Secretary of the Boxing Commission of the City of Miami Beach for the past eleven (11) years, he attended the fight held on February 25, 1964, and that he did not have among his subpoenaed records any record that reflected that the Veterans of Foreign Wars had any connection with the fight held on February 25, 1964. (TR 33) On direct examination, GLICK was asked if he was conversant with the rules and regulations of the Miami Beach Boxing Commission, and he testified that he was. (TR 33) On cross-examination, GLICK testified that the rules and regulations of the Miami Beach Boxing Commission applicable to the LISTON-CLAY fight held on February 25, 1964, prohibited either contestant from owning any interest in the other, and that if it had been disclosed to the Boxing Commission that LISTON owned an interest in CLAY, in the event that CLAY won, the fight would not have been held and would have been considered illegal by the municipality. (TR 39-40) On re-direct examination by the Petitioner, who called GLICK as its witness, GLICK testified that such rule was in effect when the subject fight was held. (TR 41) MAX LENCHNER, the Chairman of the Boxing and Wrestling Committee of the VFW Post 3559, was asked on direct examination by Petitioner about the VFW's participation in the fight. (TR 118-119) The best that LENCHNER could state was that CHRIS DUNDEE, a fight promoter in Miami Beach, would tell them

that the VFW was sponsoring a fight and that we would appear at all fights promoted by MR. DUNDEE. In explaining how that worked, LENCHNER testified that CHRIS DUNDEE would say:

> " 'We are having a fight next week, Max. Be there with the men.' *That's the way it is.*" (Emphasis added)

The Plaintiff offered in evidence a composite exhibit (PX 17) consisting of a letter and a check. The letter in full reads as follows:

> "DUNDEE-MacDONALD ENTERPRISES, INC
>
> December 26, 1963
>
> Veterans of Foreign Wars Post 3559
> Mr. M. Lencher, Commander
> 440 - 16th Street
> Miami Beach, Florida.
>
> Dear Mr. Lencher:
>
> We wish to confirm our understanding with you in that Dundee-MacDonald Enterprises, Inc. will contribute $500.00 to the Veterans of Foreign Wars Post 3559 with sponsorship and use of your name with the Liston-Clay World's Heavyweight Championship bout to be held at the Miami Beach Convention Hall on the evening of February 25, 1964.
>
> Very truly yours,
>
> /sd/
> Christ Dundee, General Manager
>
> FJL/h
> cc: Wm. B. MacDonald, Jr."

The check part of the composite exhibit (PX 17) is for the $500.00 referred to in the above-quoted letter and is dated March 4, 1964. On cross-examination, LENCHNER candidly testified that neither he nor the VFW had anything

whatever to do with putting on the subject fight. That testimony reads as follows (TR 120-121):

> "Q. Now, you had nothing whatever to do with putting on this fight, did you?
>
> A. That's right. I have nothing to do with it whatsoever.
>
> Q. Neither did the Veterans of Foreign Wars?
>
> A. That's correct."

BENJAMIN PEISER, a member of VFW Post 3559, the Plaintiff's other witness, testified that although he attended the fight as a member of the VFW and stood at an entranceway to prevent unauthorized people from coming in, he had nothing to do with the taking of tickets or ushering of people to seats. (TR 125) Additionally, PEISER testified that neither he nor the Veterans of Foreign Wars in any way contributed to the staging, conducting or putting on of the fight. That testimony reads as follows (TR 125-126):

> "Q. You didn't on behalf of the Veterans of Foreign Wars in any way contribute to the staging, holding, conducting or putting on this fight, did you?
>
> A. No."

Hence, it is apparent that the Petitioner, on its case in chief in the trial court, proved not only that the contract between the parties was illegal in requiring the performance of an illegal act; but in fact the performance of the contract accomplished an illegal purpose. The only other witness that the Petitioner called on its case in chief, as heretofore stated, was GARLAND D. CHERRY, who made no statement whatever in regard to the fight being held by and under the auspices of the Veterans of Foreign Wars. Other than testifying that the Petitioner had produced the fighters at the appointed time and place

and that the Petitioner received $225,000.00 of the $625,000.00 from MacDONALD, CHERRY frankly admitted that he prepared the so-called re-match contract (TR 66-67), and that "in the back of my mind there was always a—some question about the propriety or the legal or the lawfulness of Liston being a stockholder in Inter-Continental and at the same time being a contract party for promotion agreement." (TR 59) CHERRY also admitted that the re-match contract was kept separate from the contract between LISTON and CLAY for a championship bout because he did not want the press, public or anyone to know about the re-match contract (TR 76), and had the prohibition of the rule that GLICK testified about in mind in keeping those documents separate and secret. (TR 80) When CHERRY testified as the Petitioner's rebuttal witness, he even more frankly admitted that the re-match contract was a calculated evasion of World Boxing Association Regulation No. 10, which is identical to the rule that GLICK testified about. (TR 453) When called as an adverse witness by the Respondents, CHERRY admitted that he testified under oath before a committee of the Senate of the United States as follows (TR 148-149):

> "I would say that we could probably pick any of the states that we wanted to promote a fight in and there would be *some device* or some way to permit that fight to come to the state." (Emphasis added)

The additional witnesses that testified at the trial not only further corroborated the fact that the Petitioner had proven, namely, that the fight was not held by and under the auspices of the Veterans of Foreign Wars, but created a tidal wave of proof to that effect. JAMES J. McDONNEL, the owner and operator of Andy Frane Service, crowd control engineers and contractors, entered into a contract dated February 20, 1964, with the late WILLIAM

B. MacDONALD, JR. to handle the LISTON-CLAY fight (DX 8), and was paid $4,000.00. (DX 9) The contract expressly provides that the Andy Frane Service would supply the necessary ushering and ticket-taking personnel and guard all entranceways into the building to prevent illegal entry.

McDONNEL testified that the services called for by the letter-contract of February 20, 1964 (DX 8) were performed and that he had three hundred twenty-five (325) men at the fight and that his men exclusively handled ticket taking, ushering and admission control.

OSCAR MARKOVICH, who operates food and refreshment concessions at theaters, restaurants and auditoriums throughout the country, and who has that concession at the Miami Beach Convention Hall, testified that his men did all of the vending at the fight. (TR 174) MacDONALD corresponded with MARKOVICH on February 7, 1964, in order to coordinate MARKOVICH's function at the fight. (DX 10) MARKOVICH testified that he attended the LISTON-CLAY fight at the Miami Beach Convention Hall on February 25, 1964, and that the VFW performed no function but merely had some members present. His testimony in that respect reads as follows (TR 175-176):

"Q. Were there Veterans of Foreign Wars present at the fight?

A. Yes, there was.

Q. Isn't it a fact that they perform no function other than being present, sir?

A. I have never seen them perform any functions but I have seen them there.

Q. They are just merely present?

A. So far as I can see.

Q. They don't take tickets?

A. No, sir.

Q. They don't usher people to seats?

A. No, sir.

Q. And they don't have anything to do with refreshment concessions?

A. Nothing whatsoever.

Q. And they have nothing to do with bringing the fight to the auditorium or staging it, that you know of?

A. No, sir."

FRANK LEWIS, MacDONALD's comptroller, a former accountant with Arthur Anderson & Co., was actually MacDONALD's right-hand man in carrying out all phases of actually holding the subject prize fight. He testified that after execution of the contract of December 19, 1963, they did everything required to hold this fight, namely, rent the auditorium, worked with seating engineers on laying out the hall, hired public relations and advertising firms, contracted for printing of tickets, hired crowd control engineers and contracted for the preparation and selling of programs, and participated in all phases of actually putting on and holding the fight. (TR 282-285) LEWIS testified that the VFW had nothing to do with holding, staging or conducting the fight and merely received a contribution of $500.00. His testimony in that respect reads as follows (TR 285-286):

"Q. And in your capacity as treasurer of the corporation you participated in the negotiation of all of the phases of holding this fight as you just described, is that correct?

A. Yes, definitely.

Q. What, if anything, the Veterans of Foreign Wars, Post 3559, have to do with holding, staging or conducting the Liston-Clay fight that was held on February 25, 1964?

A. Nothing. We used their name and paid them a contribution for that.

Q. Do you remember how much the contribution was?

A. Yes, $500. This was arranged for by Chris Dundee and we paid it, Dundee-MacDonald Enterprises, Inc."

The only other testimony regarding the VFW is the statement made by the Plaintiff's exclusive agent, general manager and man-on-the-scene, MR. HAROLD CONRAD, to the effect that the VFW is merely given a handout. (TR 404-405) Conrad's specific testimony reads in the record as follows (TR 405):

"Q. Do you know what, if any, connection that organization had with this fight?

A. Well, I think there was *some kind of a handout* that these guys had been having for years in this town. You can't put on a fight unless they are at the door. I don't know what the details are. I have seen them down through the years." (Emphasis added)

C. The Second Appeal and the Decision of the United States Court of Appeals for the Fifth Circuit Rendered on April 9, 1971.

The decision of the United States Court of Appeals for the Fifth Circuit, on the second appeal of this cause, which is sought to be reviewed, is set forth in full in the appendix to this brief. The decision has not, as of the date of the drawing of this brief, been published.

Reading that decision establishes the following:

1. That contrary to the contention of the Petitioner, The United States Court of Appeals for the Fifth Circuit followed its prior decision, and decided that on remand and a trial of the cause on the merits, it was proven by overwhelming evidence that the sub-

ject public display of pugilism for reward, contrary to the public policy of the State of Florida, as pronounced in Florida Statutes, Chapter 548, was not held by and under the auspices of the VFW. The pertinent language of the holding reads as follows:

"Florida has declared a public policy forbidding the performance of prize fighting and pugilistic exhibitions for reward. This prohibition is contained in Florida Statutes Annotated § 548.01, a statute providing criminal penalties of a fine of not less than $2,500 nor more than $5,000, or imprisonment for not more than 5 years. Section 548.03, however, excepts from the prohibition boxing exhibitions which are 'held by and under the auspices of' certain named civic, educational and charitable organizations, including the Veterans of Foreign Wars, and further provides that 'nothing contained herein shall be construed to prohibit any municipality from exercising its police powers to regulate boxing and wrestling exhibitions held under the auspices of the above named organizations.'

We remanded this case for a factual determination of 'whether the fight actually was held by and under the auspices of one of the approved groups.' 367 F. 2d at 303. The District Court held that it was so held, finding specifically 'that the municipality of Miami Beach exercised its police power in regulating this match and it was held under the auspices of the VFW Post No. 3559.'. We do not agree, as the evidence is overwhelming to the contrary, and the Trial Judge's ruling is clearly erroneous. Fed. R. Civ. P. Rule 52(a).

* * *

"The evidence is quite clear that the VFW had nothing whatsoever to do with holding, staging or conducting the contest and that the parties to the contract were well aware of that fact. Harold Conrad, a writer and fight promoter, who was public

relations director for plaintiff, Inter-Continental, and also on-the-scene agent for Inter-Continental preliminary to the fight actually taking place, acknowledged in effect that the $500 paid to the VFW was a mere gratuity.

* * *

". . . The conclusion is inescapable that the Liston-Clay fight was not held under the auspices of the VFW. The use of the organization's name was a mere fiction to avoid the prohibitory Florida statute, and representation on the printed tickets of VFW sponorship was an obvious subterfuge designed to present a nominal compliance with the Florida law."

2. That the decision adheres to, applies and follows settled precedent in Florida, as required in a diversity of citizenship action under the governing doctrine established in Erie R. Co. v. Tompkins, supra. The Petitioner had contended that the Respondents were estopped from asserting illegality as a defense because MacDONALD had the obligation of conducting a lawful fight under the contract. In disposing of that issue, the United States Court of Appeals for the Fifth Circuit followed Florida law and held the following:

"A second issue before us is the finding by the District Court that inasmuch as MacDonald had the obligation of conducting a lawful fight under the contract, defendants were estopped from asserting noncompliance with the exclusion clause of Florida Statutes Annotated § 548.03.

The law of Florida is to the contrary. The Supreme Court of Florida, in *Montsdoca v. Highlands Bank & Trust Co.*, 1923, 95 So. 666, 668, said: 'The doctrines of estoppel and waiver do not in general apply in transactions that are forbidden by statute or that are contrary to public policy.' We cited *Montsdoca* and used the quoted language with ap-

proval in *Northwestern National Casualty Company* v. *McNulty*, 5 Cir., 1962, 307 F. 2d 432, 442-443. See also *State* v. *City of Hialeah*, Fla. App. 1963, 156 So. 2d 675, 676, reiterating the non-applicability of the doctrine of estoppel to transactions either forbidden by statute or contrary to public policy. The rule applies regardless of whether the party asserting the invalidity of the contract is himself a participant in the wrongdoing. In *Local No. 234, Etc.* v. *Henley & Beckwith, Inc.*, Fla., 1953, 66 So. 2d 818, 823, the Supreme Court of Florida said:

> 'The cases are legion that a contract against public policy may not be made the basis of any action either in law or in equity. . . .
>
> 'Agreements in violation of public policy are void because they have no legal sanction and establish no legitimate bond between the parties. Brumby v. City of Clearwater, supra. *Because of this the defendant may assert the invalidity of the contract even though he is a participator in the wrong.* This is so for the reason that one who has entered into a contract or undertaking which is violative of public policy owes to the public the continuing duty of withdrawing from such an agreement.' (Emphasis supplied.)

It has also been said that the illegality of a contract as a defense is allowed not to protect the defendant but as a disability to the plaintiff. *National Transformer Corp.* v. *France Mfg. Co.*, 6 Cir., 1954, 215 F. 2d 343, 361; *Roberts* v. *Criss*, 2 Cir., 1920, 266 F. 296. The evidence shows that the parties, pursuant to their contract, accomplished an unlawful purpose by virtue of an apparent subterfuge. Under the circumstances, the law will leave the parties where it finds them, and no relief shall be granted because of the dominant public interest. See *National Transformer Corp.* v. *France Mfg. Co.*, supra at 361. Cf. *Twin City Pipe Line Co.* v. *Harding Glass*

Co., 283 U.S. 353, 357, 51 S. Ct. 476, 477; *Steele* v. *Drummond*, 275 U.S. 199, 207, 48 S. Ct. 53, 55 (1927)."

It is significant to note that the case quoted from at length on the second appeal, namely, *Local No. 234, Etc.* v. *Henley & Beckwith, Inc.*, 66 So. 2d 818 (1953, Fla.), was one of the Florida Supreme Court decisions relied upon by the appellate court on the first appeal in holding that "(T)here is no doubt that a contract to perform an illegal act is void and will not be enforced in Florida courts".

3. That there is no underlying Federal question or constitutional issue, the decision of which would be obviated by application, at this stage of this litigation, of the Federal doctrine of abstention.

4. That there is no Florida statute or part thereof that has been invalidated by the decision sought to be reviewed.

QUESTION PRESENTED

Petitioner, in the "Questions Involved" section of its petition (pages 3-4), has predicated the issues presented on the following erroneous conclusions:

1. That the United States Court of Appeals for the Fifth Circuit on the second appeal, initially considered and interpreted a state statute of Florida, and by such consideration and interpretation rendered portions of the statute invalid.

2. That the decision of the United States Court of Appeals for the Fifth Circuit on the second appeal, overruled its prior decision on the same point of law.

Indulgence in these mistaken conclusions, as the basis for the presentation of the issues, in effect sets up a straw-man that does not exist for the Petitioner to knock down. That stratagem makes it impossible for the Respondents to

accept the Petitioner's statement of the question presented. The Respondents respectfully suggest that the issue may be accurately stated, in accordance with the record, as follows:

> WHETHER OR NOT A WRIT OF CERTIORARI SHOULD ISSUE TO REVIEW A DECISION OF A UNITED STATES COURT OF APPEALS, ON THE SECOND APPEARANCE OF THAT CAUSE IN THE APPELLATE COURT, UNDER THE FEDERAL DOCTRINE OF ABSTENTION, WHERE THE SUPREME COURT OF THE UNITED STATES HAD PREVIOUSLY, ON PETITION FOR A WRIT OF CERTIORARI DIRECTED TO THE FIRST APPELLATE DECISION, DECLINED TO APPLY THE ABSTENTION DOCTRINE TO THIS LITIGATION; AND WHERE, ON THE SECOND APPEAL, THE UNITED STATES COURT OF APPEALS ADHERED TO ITS PRIOR DECISION, WITHOUT INITIALLY CONSTRUING, INTERPRETING OR INVALIDATING ANY STATE STATUTE OR PART THEREOF, AND APPLIED STATE LAW THAT WAS NOT UNCERTAIN, IN A DIVERSITY OF CITIZENSHIP ACTION, TO THE FACTS OF THE CASE AND HELD THAT THE TRIAL COURT ERRED IN FACTUALLY DECIDING THE SPECIFIC ISSUE OF FACT, FOR THE TRIAL OF WHICH THE CAUSE HAD BEEN REMANDED ON THE FIRST APPEAL?

ARGUMENT

A Writ of Certiorari Should Not Issue to Review a Decision of a United States Court of Appeals, on the Second Appearance of That Cause in the Appellate Court, under the Federal Doctrine of Abstention, Where the Supreme Court of the United States Had Previously, on Petition for a Writ of Certiorari Directed to the First Appellate Decision, Declined to Apply the Abstention Doctrine to This Litigation; and Where, on the Second Appeal, the United States Court of Appeals Adhered to Its Prior Decision, Without Initially Construing, Interpreting or Invalidating Any State Statute or Part Thereof, and Applied State Law That Was Not Uncertain, in a Diversity of Citizenship Action, to the Facts of the Case and Held That the Trial Court Erred in Factually Deciding the Specific Issue of Fact, for the Trial of Which the Cause Had Been Remanded on the First Appeal.

The Federal doctrine of abstention appears to have had its origin in the case of *Railroad Commission of Texas* v. *Pullman Co.*, 312 US 496, 61 S.Ct. 643. It was decided in that case that in the exercise of a "wise discretion", Federal courts could restrain or defer the exercise of their jurisdiction in order to obtain a state court determination of state law that would avoid the necessity of deciding an underlying Federal or constitutional issue. That case involved a state question of the power of the Texas Railroad Commission to promulgate a particular order. The order raised serious questions of Federal constitutional law involving discrimination against Negroes. Deferring to state court adjudication in the optimism of avoiding the grave underlying Federal constitutional question, it was held as follows (61 S.Ct. at 645):

> ". . . If there was no warrant in state law for the Commission's assumption of authority there is an end of the litigation; the constitutional issue does not arise. . . ."

Hence the underlying purpose in the very origin of the abstention doctrine was to withhold Federal court jurisdiction where a state law issue existed and could be decided by the state courts, which would eliminate the necessity of the Federal courts deciding a Federal constitutional issue. In numerous subsequent decisions it has been held that the abstention doctrine is inapplicable to instances of properly invoked Federal court jurisdiction involving the application of state statutes. Or, in other words, the Federal judiciary will not renounce its jurisdiction in deference to the state courts to apply clear and unambiguous state statutes. *City of Chicago* v. *Atchison, T. & S.F. Ry. Co.*, 357 US 77, 78 S.Ct. 1063; *Davis* v. *Mann*, 377 US 678, 84 S.Ct. 1441; *Harman* v. *Forssenius*, 380 US 528, 85 S.Ct. 1177; and *Zwickler* v. *Koota*, 389 US 241, 88 S.Ct. 391. In *City of Chicago*, it was held (78 S.Ct. 1067):

> "After full argument on that point, both the District Court and a unanimous Court of Appeals held that § 28-31.1 applied to Transfer. That was the position of the city in both courts and it made no move there to have the matter remitted to the state courts. After referring to the provisions of § 28-31.1 the City declared in its brief in the Court of Appeals: 'A more accurate description of the business engaged in by Transfer would be hard to find.' We think this is a fair summarization. We see no ambiguity in the section which calls for interpretation by the state courts. Cf. Toomer v. Witsell, 334 US 385, 68 S.Ct. 1156, 92 L.Ed. 1460. Remission to those courts would involve substantial delay and expense, and the chance of a result different from that reached below, on the issue of applicability, would appear to be slight."

In *Davis* v. *Mann*, the pertinent language of the decision reads thusly (84 S.Ct. 1447):

> "Appellants' contention that the court below should have abstained so as to permit a state court to decide

> the questions of state law involved in this litigation is without merit. Where a federal court's jurisdiction is properly invoked, and the relevant state constitutional and statutory provisions are plain and unambiguous, there is no necessity for the federal court to abstain pending determination of the state law questions in a state court. McNeese v. Board of Education, 373 U.S. 668, 83 S.Ct. 1433, 10 L.Ed. 2d 622. This is especially so where, as here, no state proceeding had been instituted or was pending when the District Court's jurisdiction was invoked. We conclude that the court below did not err in refusing to dismiss the proceeding or stay its action pending recourse to the state courts."

In *Harman* v. *Forssenius, supra,* the following was held (85 S.Ct. at 1182):

> ". . . If the state statute in question, although never interpreted by a state tribunal, is not fairly subject to an interpretation which will render unnecessary or substantially modify the federal constitutional question, it is the duty of the federal court to exercise its properly invoked jurisdiction. . . ."

The United States Supreme Court has treated the abstention doctrine as it applies to diversity of citizenship cases and has held that its application in such matters would literally destroy diversity jurisdiction in the Federal courts. In *Meredith* v. *City of Winter Haven,* 320 US 228, 64 S.Ct. 7, a diversity of citizenship action was brought in the United States District Court for the Southern Division of Florida, seeking a declaratory judgment and injunctive relief in regard to certain revenue bonds issued by the City of Winterhaven, Florida. The complaint was dismissed for failure to state a cause of action, but on appeal, the United States Court of Appeals reversed, with directions to dismiss the cause without prejudice to the Plaintiff's right to proceed in the state courts. The Plaintiff filed

a petition for a writ of certiorari, which the United States Supreme Court granted, holding that regardless of the difficulties or uncertainties of state law, the petitioner-plaintiff had a right to have his diversity of citizenship action decided by the Federal courts as the forum of the plaintiff's choice. Deciding that but for exceptional circumstances the abstention doctrine was inapplicable in diversity of citizenship cases, and that it was the duty of the Federal courts to decide in such cases state law questions even though the state law was difficult to ascertain and even uncertain, the United States Supreme Court stated the following:

(64 S.Ct. at 11)

". . . But we are of opinion that the difficulties of ascertaining what the state courts may hereafter determine the state law to be do not in themselves afford a sufficient ground for a federal court to decline to exercise its jurisdiction to decide a case which is properly brought to it for decision.

The diversity jurisdiction was not conferred for the benefit of the federal courts or to serve their convenience. Its purpose was generally to afford to suitors an opportunity in such cases, at their option, to assert their rights in the federal rather than in the state courts. In the absence of some recognized public policy or defined principle guiding the exercise of the jurisdiction conferred, which would in exceptional cases warrant its non-exercise, it has from the first been deemed to be the duty of the federal courts, if their jurisdiction is properly invoked, to decide questions of state law whenever necessary to the rendition of a judgment. Commonwealth T. Co. v. Bradford, 297 U.S. 613, 618, 56 S.Ct. 600, 601, 80 L.Ed. 920; Risty v. Chicago, R.I. & P.R. Co., 270 U.S. 378, 387, 46 S.Ct. 236, 240, 70 L.Ed. 641; Kline v. Burke Const. Co., 260 U.S. 226, 234, 235, 43 S.Ct. 79, 82, 83, 67 L.Ed. 226, 24 A.L.R. 1077; McClellan v. Carland, 217

U.S. 268, 281, 282, 30 S.Ct. 501, 504, 505, 54 L.Ed. 762. When such exceptional circumstances are not present, denial of that opportunity by the federal courts merely because the answers to the questions of state law are difficult or uncertain or have not yet been given by the highest court of the state, would thwart the purpose of the jurisdictional act."

(64 S.Ct. at 12)

". . . Congress having adopted the policy of opening the federal courts to suitors in all diversity cases involving the jurisdictional amount, we can discern in its action no recognition of a policy which would exclude cases from the jurisdiction merely because they involve state law or because the law is uncertain or difficult to determine. The decision of this case is concerned solely with the extent of the liability of the city on its Refunding Bonds. Decision here does not require the federal court to determine or shape state policy governing administrative agencies. It entails no interference with such agencies or with the state courts. No litigation is pending in the state courts in which the question here presented could be decided. We are pointed to no public policy or interest which would be served by withholding from petitioners the benefit of the jurisdiction which Congress has created with the purpose that it should be availed of and exercised subject only to such limitations as traditionally justify courts in declining to exercise the jurisdiction which they possess. To remit the parties to the state courts is to delay further the disposition of the litigation which has been pending for more than two years and which is now ready for decision. It is to penalize petitioners for resorting to a jurisdiction which they were entitled to invoke, in the absence of any special circumstances which would warrant a refusal to exercise it."

Referring to the *Meredith* case, *supra*, the United States Supreme Court, in *Propper* v. *Clark*, 337 US 472, 69 S.Ct. 1333, 1343, commented as follows:

". . . We have refused in a diversity of citizenship case to allow the difficulty of an issue of state law to deter us from exercising our jurisdiction when federal determination was subject to equitable discretion and the state issue was the only one in the case. Meredith v. Winter Haven, 320 U.S. 228, 64 S.Ct. 7, 88 L.Ed. 9. To refrain from deciding it, we there said, would be to enervate diversity jurisdiction."

The abstention doctrine was recently summarized in *Reetz* v. *Bozanich*, 397 US 82, 90 S.Ct. 788, 790, as follows:

"It is, of course, true that abstention is not necessary when a federal court is faced with a question of local law, the classic case being Meredith v. City of Winter Haven, 320 U.S. 228, 64 S.Ct. 7, 88 L.Ed. 9, where federal jurisdiction was based on diversity only. Abstention clearly involves duplication of effort and expense and an attendant delay. See England v. Louisiana State Board, 375 U.S. 411, 84 S.Ct. 461, 11 L.Ed. 2d 440. That is why we have said that this judicially created rule which stems from Railroad Comm'n of Texas v. Pullman Co., 312 U.S. 496, 61 S.Ct. 643, 85 L.Ed. 971, should be applied only where 'the issue of state law is uncertain.' Harman v. Forssenius, 380 U.S. 528, 534, 85 S.Ct. 1177, 1182, 14 L.Ed. 2d 50. Moreover, we said in Zwickler v. Koota, 389 U.S. 241, 248, 88 S.Ct. 391, 395, 19 L.Ed. 2d 444, that abstention was applicable 'only in narrowly limited "special circumstances."' 'citing Propper v. Clark, 337 U.S. 472, 492, 69 S.Ct. 1333, 1344, 93 L.Ed. 1480. In *Zwickler*, a state statute was attacked on the ground that on its face it was repugnant to the First Amendment; and it was conceded that state court construction could not render unnecessary a decision of the First Amendment question. 389 U.S., at 250, 88 S.Ct., at 396. A state court decision here, however, could conceivably avoid any decision under the Fourteenth Amendment and would avoid any possible irritant in the federal-state-relationship.

> The *Pullman* doctrine was based on 'the avoidance of needless friction' between federal pronouncements and state policies. 312 U.S., at 500, 61 S.Ct. at 645. The instant case is the classic case in that tradition, for here the nub of the whole controversy may be the state constitution. . . ."

The Petitioner's attempted invocation of the abstention doctrine in the case at bar is wholly inappropriate. It was the Petitioner who instituted this case as a diversity of citizenship action for alleged breach of contract in the United States District Court in and for the Southern District of Florida, Miami Division. After having selected the Federal court as the forum to hear its case, the Petitioner, after two (2) rounds of appellate proceedings, now being dissatisfied with the result, urges this Court to apply the abstention doctrine and have the Federal courts renounce jurisdiction that the Petitioner invoked, where there is no underlying Federal question or constitutional law issue that will be avoided by any such effort. It was also the Petitioner that took the position, when it was respondent on the first appearance of this case in the United States Supreme Court, that the abstention doctrine was inapplicable. The Respondents have contended throughout that Florida Statutes, Chapter 548.01, is a clear and unambiguous declaration of the public policy of the State of Florida, condemning as a felony public displays of pugilism for reward, except when "held by and under the auspices of" one of the named organizations contained in Florida Statutes, Chapter 548.03. The contract between the parties calls for the holding of a public display of pugilism for reward denounced by the Florida Statutes. The Respondents also contended that if by some stretch of imagination it could be considered that the contract between the parties to this litigation somehow fell within the purview of the amendatory provisions of Florida Statutes, Chapter 548.03, exempting certain named groups from

the prohibitory provisions of Florida Statutes, Chapter 548.01, that exempted class constituted a denial of equal protection of the laws. *Morey* v. *Doud,* 354 US 457, 77 S.Ct. 1344; *Smith* v. *Cahoon,* 283 US 553, 51 S.Ct. 582; *Levy* v. *Louisiana,* 391 US 68, 88 S.Ct. 1509; and *Mayhue* v. *City of Plantation, Florida,* 375 F. 2d 447 (5th Cir., 1967). Consequently, after the first decision rendered by the United States Court of Appeals for the Fifth Circuit, a petition for certiorari was filed in the Supreme Court of the United States, requesting the invocation of the abstention doctrine so that the state courts could decide if the contract on its face violated the applicable statutes in order to avoid the potential underlying constitutional question. It was the Petitioner in this cause, who was then respondent, that contended that the abstention doctrine was inapplicable, and the United States Supreme Court denied issuance of a writ of certiorari. *The Miami Beach First National Bank, et al.* v. *Inter-Continental Promotions, Inc.,* 393 US 834, 89 S.Ct. 105 (case No. 3).

The decision now sought to be reviewed is one based wholly on facts adduced at the trial which demonstrated overwhelmingly that the public display of pugilism for reward condemned by Florida Statutes, Chapter 548.01, was not "held by and under the auspices of" any of the exempt organizations named in the amendatory provision of Florida Statutes, Chapter 548.03. Invocation of the abstention doctrine at this juncture would have the complete reverse effect of the purpose for which that doctrine was initially established in *Railroad Commission of Texas* v. *Pullman Co., supra*; because if the case were to be referred to the state courts for determination and it was decided factually that the fight was held by and under the auspices of one of the exempt groups named in Florida Statutes, Chapter 548.03, that would revive rather than avoid a determination of the constitutional question of

whether or not a state can condemn certain acts as a felony as to all others and exempt certain named groups from the prohibitions and penalties of the act itself.

On the first appeal, the case was remanded to the lower court for a trial of the specific factual question "of whether the fight actually was held by and under the auspices of one of the approved groups". (*Inter-Continental Promotions, Inc.* v. *MacDonald,* 367 F. 2d 293, 303) Trial was had, and the lower court found that "there is testimony which indicates that the fight was held under the auspices of the VFW, *but not by the VFW*". (Emphasis supplied) On the second appeal, the United States Court of Appeals, adhering to its prior decision, held that the trial court erroneously decided the factual issue, in that, the subject public display of pugilism for reward was not actually "held by and under the auspices of" the VFW, and that, therefore, the parties, pursuant to their contract, "accomplished an unlawful purpose". In rendering that decision, which is sought to be reviewed, the appellate court applied Florida law to the unambiguous provisions of Florida Statutes, Chapter 548. As stated, Florida Statutes, Chapter 548, in clear and unambiguous language, condemns, by virtue of Section 548.01, public displays of pugilism for reward as a felony, and in Section 548.03 exempts such displays when "held by and under the auspices of" one of the named organizations, and further provides for municipal police regulation when exempted, permissible prize fights are held within the territorial limits of a municipality. Clearly, when a public display of pugilism for reward is conducted in Florida and held by and under the auspices of one of the exempt organizations, if it is held within the territorial limits of a municipality, that city can exercise its police powers to regulate seating, crowd capacity, the requisite number of fire exits,

and the like, in order to preserve and protect the health, welfare and safety of the public.

Under Florida law, a contract is unquestionably illegal and unenforceable when it appears from the contract or from its operation or results, that in its terms or in its full operation it is unlawful or its operation accomplishes or tends to accomplish an unlawful purpose, whether so intended by the parties or not, because the law, through the judiciary, will not lend its support to a claim that is founded on its own violation. See: *Stewart* v. *Stearns & Culver Lumber Co.*, (1908) 56 Fla. 570, 48 So. 19, 24 LRA NS 649; *Escambia Land & Mfg. Co.* v. *Ferry Pass Inspectors & Shippers Asso.*, (1910) 59 Fla. 239, 52 So. 715, 138 Am. St. Rep. 121; *Citizens' Bank & Trust Co.* v. *Mabry*, (1931) 102 Fla. 1084, 136 So. 714; *Local 234, U.A.J.A.* v. *Henley & Beckwith, Inc.*, (1953, Fla.) 66 So. 2d 818; *Schaal* v. *Race*, 135 So. 2d 252 (Fla. App. 2d, 1961); and *Gonzalez* v. *Trujillo*, 179 So. 2d 896 (Fla. App. 3rd, 1965). In the *Stewart* case, *supra*, the Florida Supreme Court held:

(48 So. at 25)

". . . Until the contrary appears, it is assumed that a contract is made for and will accomplish only a lawful purpose; and no strained or unusual construction should be given to a contract so as to render it unlawful. But when it appears from a contract and the circumstances under which it was made, and from its purposes, operation, and results, that in its terms or in its full operation it is unlawful, or its operation accomplishes or in reality tends to accomplish an unlawful purpose, whether so intended by the parties thereto or not, the contract will not be enforced by the courts."

(48 So. at 26)

"The illegality in the agreement or in its operation need not amount to a criminal offense. The test is whether the agreement in full operation will be injurious to the public welfare. If so, it will not be enforced."

In the *Citizens' Bank & Trust Co.* case, *supra*, the Florida Supreme Court held (136 So. at 717):

"We must therefore hold that Citizens' Bank & Trust Company not only had no authority to acquire the capital stock of another bank, but its act in doing so was in direct violation of law; all of such stock having been acquired subsequent to the Act of 1917. Not only was the act in violation of law, but it was condemned by statute as a crime, and of this the Franklin Bank is charged with full and complete knowledge.

The next question to be determined is whether or not, when the act of Citizens' Bank & Trust Company in acquiring the stock was ultra vires, the bank can now be held to pay the amount of the assessment based on the ownership of that stock.

In Lassiter & Co. v. Taylor, 99 Fla. 819, 128 So. 14, 19, 69 A.L.R. 689, in an opinion written by Mr. Commissioner Davis, this court said, quoting with approval from Berka v. Woodward, 125 Cal. 119, 57 P. 777, 45 L.R.A. 420, 73 Am. St. Rep. 31:

'This, then, is the undoubted rule, that, when a contract is expressly prohibited by law, no court of justice will entertain an action upon it, or upon any asserted rights growing out of it. And the reason is apparent; for to permit this would be for the law to aid in its own undoing. Says the Supreme Court of the United States in President, etc. v. Owens, 2 Pet. 527 (7 L.Ed. 508): "No court of justice can, in its nature, be made the handmaid of iniquity. Courts are instituted to carry into effect the laws of

the country. How can they become auxiliary to the consummation of violations of law? There can be no civil right where there can be no legal remedy, and there can be no legal remedy for that which is itself illegal." And again the same august tribunal, in Coppell v. Hall, 7 Wall. 542 (19 L.Ed. 244), says:

> "Whenever the illegality appears, whether the evidence comes from one side or the other, the disclosure is fatal to the case. No consent of the defendant can neutralize its effect. A stipulation in the most solemn form to waive the objection would be tainted with the vice of the original contract and void for the same reasons.
>
> Where the contamination reaches it destroys. The principle to be extracted from all the cases is that the law will not lend its support to a claim founded on its own violation.'"

In *Schaal* v. *Race*, *supra*, the Florida appellate court, quoting from Professor Pomeroy's treatise on Specific Performance of Contracts, held as follows (135 So. 2d at 257):

> "Then at page 651, § 286, Defense of Illegality Rests Upon Reasons of Public Policy, it is stated:
>
> 'As has already been stated, courts set aside or refuse to enforce illegal contracts, in general, not from any regard for the objecting party, nor from a desire to protect *his* individual interests, but from reasons of public policy. Where two persons with equal knowledge and equally participating in the fault, have entered into an illegal agreement, and one of them has obtained by the other's voluntary act all the benefit of it for himself, his refusal to perform on his own part is, generally considered in itself alone, unjust and inequitable; but the law sustains him in this position, because it takes into account the interest of society and of the state, which demand the complete suppression of such

> agreements. The objection which prevails and avoids the illegal contract comes not from the individual litigant, but from the public at large who speak through the courts. Whenever, therefore, in a suit for specific performance, the illegality, not having been alleged in the pleadings, is disclosed, for the first time by the evidence, the court will on its own motion pursue the investigation, and, if the fact is established refuse to enforce the agreement. * * *'"

Moreover, in *Local 234, etc.* v. *Henley & Beckwith, Inc., supra,* the Supreme Court of Florida, as quoted in the decision sought to be reviewed, held the following (66 So. 2d at 823):

> "The cases are legion that a contract against public policy may not be made the basis of any action either in law or in equity. . .
>
> "Agreements in violation of public policy are void because they have no legal sanction and establish no legitimate bond between the parties. Brumby v. City of Clearwater, supra. *Because of this the defendant may assert the invalidity of the contract even though he is a participator in the wrong.* This is so for the reason that one who has entered into a contract or undertaking which is violative of public policy owes to the public the continuing duty of withdrawing from such an agreement." (Emphasis supplied)

It is readily apparent that under the law of Florida, it is the public interest that the courts protect in sustaining the defense of illegality to a suit brought for the alleged breach of contract. The public interest in the instant case was expressed by the Legislature of the State of Florida in Florida Statutes, Chapter 548, condemning as a felony public displays of pugilism for reward. The contract between the parties unquestionably resulted in the public

being subjected to a public display of pugilism for reward. The amendatory provisions contained in Florida Statutes, Chapter 548.03, permitting public displays of pugilism for reward if, and only if, "held by and under the auspices of" one of the named exempt organizations, was factually not complied with because the subject prize fight was not held by and under the auspices of any exempt organization. The focus of concern, based on Florida precedent, in upholding the defense of illegality is to discourage contracts of the kind involved in this litigation which subject the public to the very type of display of pugilism for reward condemned by the Legislature of the State of Florida. The illegality contaminates, as demonstrated, everything that it touches. The law of Florida denounces as void any contract calling for the performance of an act where a statute pronounces a penalty for that act. The obligation under the contract between the parties in this case specifically called for the performance of acts by MacDONALD in which the statutes of the State of Florida impose a penalty if performed by anyone other than the organizations named in the amendatory provisions of Section 548.03. Neither MacDONALD nor the Petitioner is one of the entities named in the statute; consequently, their contract under the law of Florida was void. The fact that the party asserting the illegality is guilty of performing the illegal act, pursuant to his contractual obligation, does not preclude the defense. In the *Citizens' Bank & Trust Co.* case, *supra*, the bank illegally purchased stock in another bank, but the Florida Supreme Court nevertheless permitted the bank to assert illegality as a defense. Moreover, as the United States Court of Appeals for the Fifth Circuit pointed out in the decision sought to be reviewed, under Florida law "(t)he doctrines of estoppel and waiver do not in general apply in transactions that are forbidden by statute or that are contrary to

public policy." *Montsdoca* v. *Highlands Bank & Trust Co.*, 85 Fla. 158, 95 So. 666, 668. In the case sub judice there was no reasonable debate that there was an unlawful public display of pugilism for reward perpetrated on the public through the performance of the contract between the parties. Consequently, in the decision sought to be reviewed, the United States Court of Appeals for the Fifth Circuit concluded its decision by holding thusly:

> ". . . Under the circumstances, the law will leave the parties where it finds them, and no relief shall be granted because of the dominant public interest. . . ."

Hence, it is apparent that the decision sought to be reviewed in no way calls for the application of the abstention doctrine. The decision follows Florida law in a diversity of citizenship action arising out of the United States District Court in and for the Southern District of Florida, Miami Division, the jurisdiction of which was activated by the Petitioner. There are no ambiguous statutes involved that were interpreted, construed or invalidated by the decision under scrutiny. Furthermore, there is no outstanding Federal question or issue of constitutional law extant in this litigation, much less one that can be avoided by deferring Federal jurisdiction to state court jurisdiction. In fact, the reverse could have been the case had it not been decided factually as the decision was rendered.

Before closing, Respondents are constrained to point out, despite the Petitioner's contention being factually incorrect, that the decision sought to be reviewed conflicts with the decision rendered on the first appeal, that under Florida law the appellate court sitting in a diversity of citizenship action could have altered, varied or reversed its prior decision. As heretofore stated, all that was done on the second appeal was follow the first appeal by holding that the trial court was in error on the factual con-

clusion reached on the issue of fact for the trial of which the cause had been previously remanded. In Florida, the doctrine of the law of the case is not absolute, and the Florida appellate courts have held that errors made on a first appeal can be corrected on a second review. *Beverly Beach Properties* v. *Nelson*, 68 So. 2d 605 (1963, Fla.) and *Hendrick* v. *Strazzula*, 168 So. 2d 156 (Fla. App. 2d, 1964). In the last cited authority, the District Court of Appeal in and for the Second District of Florida, relying upon the Florida Supreme Court decision in *Beverly Beach Properties, supra*, held as follows (168 So. 2d at 161):

> "Finally, it is contended by the defendants that in this court's decision on the former appeal we held adversely to the plaintiff on the question here presented, and it is argued that the decision there became the 'law of the case.' With this contention we cannot agree. The facts and circumstances on this appeal are materially different from those on the former appeal; but even if we now should find that we were in error on that point of the case, we have the power to correct it. In Beverly Beach Properties v. Nelson, Fla. 1954, 68 So. 2d 604, 607, 41 A.L.R. 2d 1071, Justice Hobson speaking for the Court said:
>
> > 'This is the same suit and we have not lost jurisdiction thereof. Consequently, we have the power to correct any error which the Chancellor *or we* may have heretofore made in the progress of this litigation. * * *' (Emphasis added)"

Hence, it is apparent that the Petitioner's contention is both legally and factually incorrect. It is factually incorrect because on the second appeal the appellate court followed its prior decision and held that the trial court incorrectly decided the factual issue for the trial of which the cause was remanded. Legally the Petitioner is incorrect because even had the appellate court overruled its prior decision in the

same case, on the same point of law, that judicial power was vested in the appellate court, pursuant to Florida law, which must be applied in this diversity action under *Erie R. Co.* v. *Tompkins, supra.* Consequently, the assertion by the Petitioner that the second decision constitutes an overruling of the first decision, and that doing so was "a departure from the accepted and usual course of judicial proceedings to such an extent as to warrant the exercise by this Court of its supervisory powers"; is both inaccurate and incorrect.

CONCLUSION

The petition for a writ of certiorari filed in this cause should be denied. The Petitioner's attempt to invoke the abstention doctrine is wholly inappropriate. Acceptance of the Petitioner's position in that respect would mark the expansion of the abstention doctrine to the point where Federal diversity of citizenship jurisdiction would be totally eviscerated. It would mean that a plaintiff could select the Federal court as the forum in which to litigate its diversity of citizenship action, and then after losing the case on the facts turn around and demand the withholding of the jurisdiction that it invoked in order to re-litigate the case that it lost. The only policy that such a proposition could conceivably foster would be interminable delay and expense, contrary to all reasonably recognized principles encouraging the fair, efficient, expeditious, inexpensive termination of litigation at its earliest possible point.

The petition should similarly be denied on the only other ground asserted by the Petitioner, namely, that the decision sought to be reviewed, constituting the second appearance of this cause in the United States Court of Appeals for the Fifth Circuit, was an overruling of the earlier decision which amounted to a departure from the accepted

and usual course of judicial proceedings to such an extent warranting the exercise of the supervisory powers of the Supreme Court of the United States. That contention is incorrect, legally and factually—factually, because the first decision was not overruled but followed, in that, the cause was initially remanded to the trial court to try the factual question of whether or not the subject public display of pugilism for reward was actually held by and under the auspices of one of the exempted groups named in Florida Statutes, Chapter 548.03, and the appellate court decided that the trial court was in error because "the evidence is overwhelming to the contrary"; and legally because, in this diversity of citizenship action, the Federal court, pursuant to *Erie R. Co.* v. *Tompkins, supra,* must apply Florida law, and under Florida law the doctrine of the law of the case is not absolute, and the appellate court on a second review had the authority to overrule its earlier decision.

For the reasons stated in this brief, it is respectfully requested that the petition for certiorari be denied.

Respectfully submitted,

.....
Marion E. Sibley

.....
Irving B. Levenson
Attorneys for Respondents
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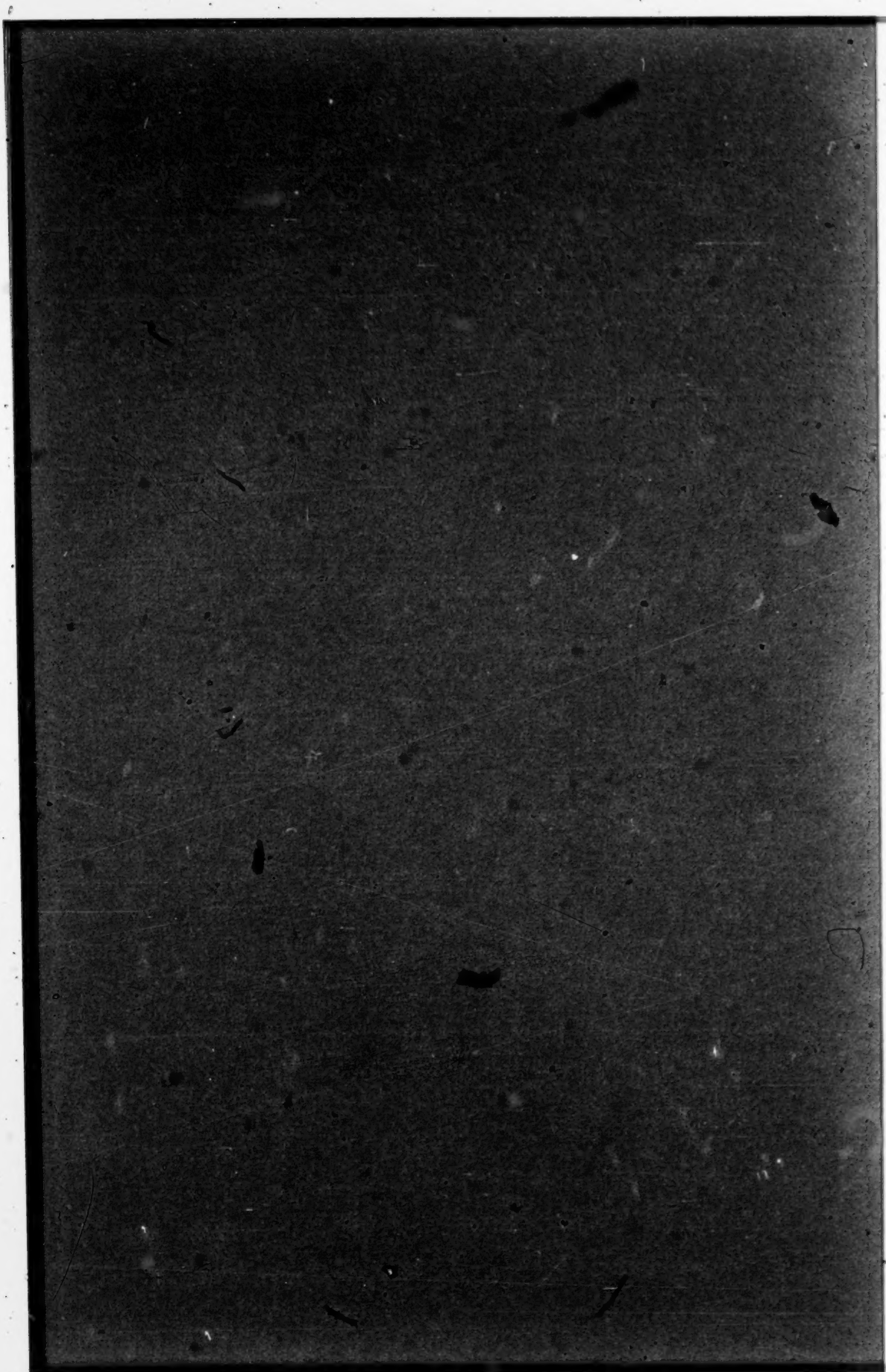
CERTIFICATE OF SERVICE

The undersigned certifies that three (3) true and correct copies of the above and foregoing "Respondents' Brief in Opposition to Petition for Writ of Certiorari" were furnished by mail to HANSFORD H. TYLER, JR. and DAVID D. PHILLIPS, HORTON & SCHWARTZ, and MURRAY SAMS, Attorneys for Petitioner, 410 Concord Building, Miami, Florida 33130, by depositing the same in a United States mail box with first class postage prepaid affixed, on this the 28th day of July, 1971.

.....

Irving B. Levenson



A1

CHAPTER 548

Pugilistic Exhibitions

548.01 Prize fighting, pugilistic exhibitions; penalty. —Any person who shall voluntarily engage in any pugilistic exhibition, fight or encounter, with or without gloves, between man and man, or in an exhibition or fight between man and bull, or between man and any other animal, for money or anything of value, or upon the result of which any money or anything of value is to be collected, acquired, bet or wagered, or to see which any admission fee is charged, directly or indirectly, shall be punished by a fine of not less than two thousand five hundred, nor more than five thousand dollars, or by imprisonment for not more than five years.

History.—§1, ch. 4402, 1895; GS 3253; RGS 5084; CGL 7186.

cf.—§775.06, Alternative punishment.

548.02 Second, stakeholder, etc.; penalty.—

(1) Any person who shall act as second, stakeholder, counselor or advisor, or who shall render aid of any such character, for or to the principal or either of them in such exhibition, encounter, or fight shall be deemed a principal in the offense, and shall be punished as prescribed in §548.01.

(2) The sheriff or his deputies, in any county where there is cause to believe that such an encounter or contest is about to occur, shall enter any house or enclosure, or any other place, and arrest, without warrant, any party engaged or about to engage in such contest.

History.—§2, ch. 4402, 1895; GS 3254; RGS 5085; CGL 7187.

548.03 Pugilistic exhibition defined.—By the term "Pugilistic exhibition, encounter or fight, with or without gloves," as used in this chapter, is meant any voluntary fight or personal encounter, by blows, between two or more persons, for money, prize of any character, points, distinction or fame, or other thing of value, or upon the results of which any money or thing of value is bet or wagered, or for which an admission fee is charged, directly or indirectly; provided, that nothing contained herein or in any law or municipal regulation shall be construed as applying to boxing exhibitions held by and under the auspices of the American legion, disabled American veterans, veterans of foreign wars of the United States, Spanish-American war veterans, or companies or detachments of the Florida national guard, Y. M. C. A., junior chamber of commerce, or any college which is a member of any recognized amateur athletic association and the Circulo Cubana club, a charitable organization now in existence, whether an admission fee is charged or not; provided further, that nothing contained herein shall be construed to prohibit any municipality from exercising its police powers to regulate boxing and wrestling exhibitions held under the auspices of the above named organizations.

History.—§3. ch. 4402, 1895; GS 3255; RGS 5086; §1, ch. 12213, 1927; CGL 7188; §1, ch. 14831, 1931; §1, ch. 17179, 1935; §1, ch. 26729, 1951; §1, ch. 57-782.

548.04 Physician.—At any boxing, sparring or wrestling match or exhibition permitted under §548.03 there shall be in attendance a duly licensed physician, whose duty it shall be to observe the physical condition of the boxers or wrestlers and advise the referee or judges with regard thereto; any competent physician who has not had less than three years experience as a practitioner may be

licensed. No boxer or wrestler shall be permitted to enter the ring unless, not more than three hours before, a physician shall certify in writing that the boxer or wrestler is physically fit to engage in the proposed contest. The physician's fee shall be paid by the licensee conducting the match or exhibition.

History.—§1, ch. 57-154.

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 29404

INTER-CONTINENTAL PROMOTIONS, INC.,
Plaintiff-Appellee,

versus

THE MIAMI BEACH FIRST NATIONAL BANK and FRED R. BAISDEN, as Executors of the Last Will and Testamant of William B. MacDonald, Jr., deceased, Etc.,
Defendants-Appellants,

Appeals from the United States District Court for the Southern District of Florida

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(April 9, 1971)

Before GEWIN, COLEMAN and AINSWORTH, Circuit Judges.

AINSWORTH, Circuit Judge: This Florida diversity matter is before us a second time. On the first occasion we reversed the District Judge, who granted defendants' motion to dismiss for failure to state a claim, and remanded the case for trial on the merits. See *Inter-Continental Promotions, Inc. v. MacDonald,* 5 Cir., 1966, 367 F. 2d 293. Accordingly, a trial was held with a full development of the facts and circumstances of the case. This time the District Court (sitting without a jury) rendered judgment in favor of plaintiff.

This breach of contract action by Inter-Continental Promotions, Inc. against William B. MacDonald, Jr.[1] grows out of the world heavyweight championship fight between Charles "Sonny" Liston and Cassius Clay on February 25, 1964. Inter-Continental and MacDonald entered into a contract by which Inter-Continental agreed to produce Liston and Clay at the specified time and place in Miami Beach, Florida, where they would engage in the boxing contest.[2] In consideration of the payment of $625,000, payable upon the completion of the boxing contest, MacDonald was to receive the live gate proceeds. However, all ancillary rights, such as television, radio and movie rights, were retained by Inter-Continental. Under the contract MacDonald had "the right and obligation to promote said boxing contest in the manner he deems fit; to print and sell admission tickets thereto; to collect the proceeds of ticket sales; to arrange all seatings; to make whatever arrangements he deems necessary for the press; to pay all local, state, and federal taxes on admissions; to arrange and pay for the undercard preliminary fights; to pay all fees and expenses of the controlling boxing commission; to advertise and promote said live gate; to make press releases; and, to do any and all things of that kind and nature reasonably necessary for the enhancement of said live gate." Arrangements were duly made and on February 25, 1964, Clay knocked out Liston and won the heavyweight championship of the world. The gate receipts of

1. The complaint was originally brought against William B. MacDonald, Jr. and his surety, New Amsterdam Casualty Company. Upon the death of MacDonald, appellants, The Miami Beach First National Bank and Fred R. Baisden, as Executors of the Last Will and Testament of William B. MacDonald, Jr., were substituted in the place and stead of MacDonald and New Amsterdam Casualty Company.

2. William B. MacDonald, Jr. subsequently assigned to Dundee-MacDonald Enterprises, Inc. his rights and duties under the contract.

only $225,000, however, fell far short of MacDonald's expectations and the consideration he had agreed to pay for those rights. He turned over the gate receipts to Inter-Continental which then brought this suit for the balance.

Florida has declared a public policy forbidding the performance of prize fighting and pugilistic exhibitions for reward. This prohibition is contained in Florida Statutes Annotated § 548.01, a statute providing criminal penalties of a fine of not less than $2,500 nor more than $5,000, or imprisonment for not more than 5 years.[3] Section 548.03, however, excepts from the prohibition boxing exhibitions which are "held by and under the auspices of" certain named civic, educational and charitable organizations, including the Veterans of Foreign Wars, and further provides that "nothing contained herein shall be construed to prohibit any municipality from exercising its police powers to regulate boxing and wrestling exhibitions held under the auspices of the above named organizations."[4]

---

3. This section reads as follows:

"548.01 Prize fighting, pugilistic exhibitions; penalty.—

"Any person who shall voluntarily engage in any pugilistic exhibition, fight or encounter, with or without gloves, between man and man, or in an exhibition or fight between man and bull, or between man and any other animal, for money or anything of value, or upon the result of which any money or anything of value is to be collected, acquired, bet or wagered, to see which any admission fee is charged, directly or indirectly, shall be punished by a fine of not less than two thousand five hundred, nor more than five thousand dollars, or by imprisonment for not more than five years."

4. This section reads as follows:

"548.03 Pugilistic exhibition defined.—

"By the term 'Pugilistic exhibition, encounter or fight, with or without gloves,' as used in this chapter, is meant any voluntary fight or personal encounter, by blows, between two or more persons, for money, prize of any character, points, distinction or fame, or other thing of value, or upon the results of which any money or thing of value is bet or wagered, or for which an admission fee is charged, directly or indirectly; provided, that nothing contained herein or in any law or munici-

We remanded this case for a factual determination of "whether the fight actually was held by and under the auspices of one of the approved groups." 367 F. 2d at 303. The District Court held that it was so held, finding specifically "that the municipality of Miami Beach exercised its police power in regulating this match and it was held under the auspices of the VFW Post No. 3559." We do not agree, as the evidence is overwhelming to the contrary, and the Trial Judge's ruling is clearly erroneous. Fed. R. Civ. P. Rule 52(a).

In order to circumvent the prohibitory statute against the promotion of pugilistic exhibitions, it is apparent that an arrangement was made to use the name of Veterans of Foreign Wars, Post 3559 of Miami, Florida, as sponsor of the fight. The consideration paid to the VFW for the use of their name was the nominal sum of $500 cash. Two members of VFW Post 3559 testified that approximately twenty of their members were in attendance on the night of the fight. The Secretary of the Miami Beach Boxing Commission testified that he knew that Dundee-MacDonald was the promoter of the fight but that he actually observed members of the VFW present and that their presence was necessary in order to make the boxing contest a legal venture under the laws of Florida. He also identified sample tickets for the fight on which are printed the words "Sponsored by V.F.W. Miami Beach Post No. 3559." The same

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pal regulation shall be construed as applying to boxing exhibitions held by and under the auspices of the American legion, disabled American veterans, veterans of foreign wars of the United States, Spanish-American war veterans or companies or detachments of the Florida national guard, Y.M.C.A., junior chamber of commerce, or any college which is a member of any recognized amateur athletic association and the Circulo Cabana club, a charitable organization now in existence, whether an admission fee is charged or not; provided further, that nothing contained herein shall be construed to prohibit any municipality from exercising its police powers to regulate boxing and wrestling exhibitions held under the auspices of the above named organizations."

witness testified that the Dundee-MacDonald Enterprises had applied for and been issued a license by the Boxing Commission to stage the championship fight.

The evidence is quite clear that the VFW had nothing whatsoever to do with holding, staging or conducting the contest and that the parties to the contract were well aware of that fact. Harold Conrad, a writer and fight promoter, who was public relations director for plaintiff, Inter-Continental, and also on-the-scene agent for Inter-Continental preliminary to the fight actually taking place, acknowledged in effect that the $500 paid to the VFW was a mere gratuity. The record discloses that he was asked, in that part of his deposition offered in evidence by defendants' counsel, as an admission against interest, the following:

> "Q. Do you know what, if any, connection that organization had with this fight?
> "A. Well, I think there was some kind of a handout that these guys had been having for years in this town. You can't put on a fight unless they are at the door. I don't know what the details are. I have seen them down through the years."

The Chairman of VFW Post 3559 Boxing and Wrestling Committee, Max Lenchner, testified that VFW had nothing to do with staging the fight. He said that he was told by Mr. Dundee, "We are having a fight next week, Max. Be here with the men." And Lenchner said, "That's the way it is." He further said the check for $500 was received by him, which was paid "for the use of its name in sponsorship of the fight." Then he was asked:

> "Q. Now, you had nothing whatever to do with putting on this fight, did you?
> "A. That's right. I have nothing to do with it whatsoever.
> "Q. Neither did the Veterans of Foreign Wars?
> "A. That's correct."

Benjamin Peiser, a member of the VFW Post Committee, who attended the fight and remained at the doorway in order in keep out unauthorized people, testified that the $500 check paid to the Post "was given to our organization for attending that fight." He said he had nothing to do with the taking of tickets, however, and that neither he nor the VFW in any way contributed to staging, holding, conducting or putting on the fight.

Frank Lewis, who was an officer and member of the board of directors of all of the MacDonald Corporations and comptroller of MacDonald, testified that VFW Post 3559 had nothing to do with holding, staging or conducting the Liston-Clay fight. He said:

> "Q. And in your capacity as treasurer of the corporation you participated in the negotiation of all of the phases of holding this fight as you just described; is that correct?
>
> "A. Yes, definitely.
>
> "Q. What, if anything, did the Veterans of Foreign Wars, Post 3559, have to do with holding, staging or conducting the Liston-Clay fight that was held on February 25, 1964?
>
> "A. Nothing. We used their name and paid them a contribution for that.
>
> "Q. Do you remember how much the contribution was?
>
> "A. Yes, $500. This was arranged for by Chris Dundee and we paid it, Dundee-MacDonald Enterprises, Inc."

Lewis also testified that "everybody was trying to get into the fight free" and so he restricted the number of people from the Veterans of Foreign Wars which had submitted a list of over thirty names to an authorization of twenty only.

Oscar Markovich, who handled the vending concessions at the Liston-Clay fight at Miami Beach, and who has been at many fights at the Convention Hall as refreshment concessionaire, also testified that the VFW Post had nothing to do with staging the fight. He said:

"Q. Were there Veterans of Foreign Wars present at the fight?

"A. Yes, there was.

"Q. Isn't it a fact that they perform no function other than being present, sir?

"A. I have never seen them perform any functions but I have seen them there.

"Q. They are just merely present?

"A. So far as I can see.

"Q. They don't take tickets?

"A. No, sir.

"Q. They don't usher people to seats?

"A. No, sir.

"Q. And they don't have anything to do with any refreshment concessions?

"A. Nothing whatsoever.

"Q. And they have nothing to do with brining [sic] [bringing] the fight to the auditorium or staging it, that you know of?

"A. No, sir."

The record further shows that MacDonald (or Dundee-MacDonald Enterprises, Inc.) performed all the necessary acts requisite to promoting and staging the fight. They leased the convention hall, worked out arrangements with crowd-control and seating engineers, employed firms to take care of publicity and advertising, contracted for the printing of tickets and programs, and actively handled every facet of promoting and conducting the fight. The conclusion is inescapable that the Liston-Clay fight was not held under the auspices of the VFW. The use of the

organization's name was a mere fiction to avoid the prohibitory Florida statute, and representation on the printed tickets of VFW sponsorship was an obvious subterfuge designed to present a nominal compliance with the Florida law.

A second issue before us is the finding by the District Court that inasmuch as MacDonald had the obligation of conducting a lawful fight under the contract, defendants were estopped from asserting noncompliance with the exclusion clause of Florida Statutes Annotated § 548.03.

The law of Florida is to the contrary. The Supreme Court of Florida, in *Montsdoca v. Highlands Bank & Trust Co.*, 1923, 95 So. 666, 668, said: "The doctrines of estoppel and waiver do not in general apply in transactions that are forbidden by statute or that are contrary to public policy." We cited *Montsdoca* and used the quoted language with approval in *Northwestern National Casualty Company v. McNulty,* 5 Cir., 1962, 307 F. 2d 432, 442-443. See also *State v. City of Hialeah,* Fla. App. 1963, 156 So. 2d 675, 676, reiterating the non-applicability of the doctrine of estoppel to transactions either forbidden by statute or contrary to public policy. The rule applies regardless of whether the party asserting the invalidity of the contract is himself a participant in the wrongdoing.[5] In *Local No. 234, Etc. v. Henley & Beckwith, Inc.*, Fla., 1953, 66 So. 2d 818, 823, the Supreme Court of Florida said:

> "The cases are legion that a contract against public policy may not be made the basis of any action either in law or in equity. . . .

5. See also Citizens' Bank & Trust Co. v. Mabry, Fla., 1931, 136 So. 714, 717; Robert G. Lassiter & Co. v. Taylor, Fla., 1930, 128 So. 14, 19; LeJohn Manufacturing Company v. Webb, D. C. Cir., 1955, 222 F. 2d 48, 52; National Transformer Corp. v. France Mfg. Co., 6 Cir., 1954, 215 F. 2d 343, 361; Standard Lumber Co. v. Butler Ice Co., 3 Cir., 1906, 146 F. 359, 362.

> "Agreements in violation of public policy are void because they have no legal sanction and establish no legitimate bond between the parties. Brumby v. City of Clearwater, supra. *Because of this the defendant may assert the invalidity of the contract even though he is a participator in the wrong.* This is so for the reason that one who has entered into a contract or undertaking which is violative of public policy owes to the public the continuing duty of withdrawing from such an agreement." (Emphasis supplied.)

It has also been said that illegality of a contract as a defense is allowed not to protect the defendant but as a disability to the plaintiff, *National Transformer Corp. v. Finance Mfg. Co.*, 6 Cir., 1954, 215 F. 2d 343, 361; *Roberts v. Criss*, 2 Cir., 1920, 266 F. 296. The evidence shows that the parties, pursuant to their contract, accomplished an unlawful purpose by virtue of an apparent subterfuge. Under the circumstances, the law will leave the parties where it finds them, and no relief shall be granted because of the dominant public interest. See *National Transformer Corp v. France Mfg. Co.*, supra at 361. CF. *Twin City Pipe Line Co. v. Harding Glass Co.*, 283 U. S. 353, 357, 51 S. Ct. 476, 477; *Steele v. Drummond*, 275 U. S. 199, 207, 48 S. Ct. 53, 55 (1927).

REVERSED.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-19

INTER-CONTINENTAL PROMOTIONS, INC.,

Petitioner,

vs.

MIAMI BEACH FIRST NATIONAL BANK, and FRED B. BAISDEN, as executors of the Last Will and Testament of W. B. MacDonald, Jr., deceased, and NEW AMSTERDAM CASUALTY CO.,

Respondents.

PETITION FOR REHEARING OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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PETITION FOR REHEARING OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

INTRODUCTION.

On or about October 12, 1971, this Court denied a petition for certiorari to review a decision in this cause by the United States Court of Appeals for the Fifth Circuit, 441 F. 2d 1356.[1] In accordance with Rule 58 of the

[1] That opinion and another previous opinion by the same court in this cause, 367 F. 2d 293 (1966), are set forth in full in the petition for certiorari and have not been duplicated in this petition.

Rules of this Court, petitioner sometimes hereinafter called plaintiff, respectfully submits this petition for rehearing of that petition based upon a substantial ground available to petitioner although not previously presented.

In essence, that ground is that the decision of the court below deprives plaintiff of the right guaranteed by the constitution and laws of the United States to have this controversy resolved in accordance with the law of the State of Florida, *Erie R. Co.* v. *Tompkins,* 304 U.S. 64, 58 S. Ct. 817 (1938), and that because resolution of the controversy here depends upon Florida law based on statutes, rules of decision, municipal ordinances, and administrative regulations, all of which are complicated and in the main have not been construed by Florida appellate courts, this may be a case peculiarly appropriate for the application of the "abstention" doctrine of this Court. See *Askew* v. *Hargrave,* 401 U.S. 476, 91 S. Ct. 856 (1971); *Jackson* v. *Ogilvie,* 401 U.S. 904, 91 S. Ct. 642 (1971); *Fornaris* v. *Ridge Tool Co.,* 400 U.S. 41, 91 S. Ct. 156 (1970); and *Reetz* v. *Bozanich,* 397 U.S. 82, 90 S. Ct. 788 (1970). This is particularly true where, as here, as this Court pointed out in *Clay* v. *Sun Insurance Office, Ltd.,* 363 U.S. 207, 212, 80 S. Ct. 1222, 1226 (1960):

> "The Florida legislature, with rare foresight, has dealt with the problem of authoritatively determining unresolved state law involved in federal litigation by a statute which permits a federal court to certify such a doubtful question of state law to the Supreme Court of Florida for its decision. Fla. Stat. Ann., 1957, §25.031."[2]

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[2] A copy of that statute is appended hereto marked Appendix A, together with a copy of Rule 4.61 of the Florida Appellate Rules, Certified Questions from Federal Courts, marked Appendix B.

STATEMENT OF FACTS.

Petitioner entered into a written contract on December 19, 1963, with William B. MacDonald, Jr., (hereinafter sometimes called defendant) under the terms of which plaintiff was to produce Sonny Liston and Cassius Clay in Miami Beach for a boxing exhibition and the defendant was:

> ". . . to promote said boxing contest in the manner he deems fit; to print and sell admission tickets thereto; to collect the proceeds of ticket sales; to arrange all seatings; to make whatever arrangements he deems necessary for the press; to pay all local, state, and federal taxes on admissions; to arrange and pay for the undercard preliminary fights; to pay all fees and expenses of the controlling boxing commission; to advertise and promote said live gate; to make press releases; and, to do any and all things of that kind and nature reasonably necessary for the enhancement of said live gate." * * * (App. 8).[3]

Florida Annotated Statutes, Chapter 548, "Pugilistic Exhibitions," provides in pertinent part:

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[3] In this petition for rehearing, references will be made to the appendix in the court below so designated. It appears that on the application of counsel for the respondent that appendix was filed with this Court on or about July 23, 1971. With the hope that it will further facilitate this Court's consideration of this petition, some significant portions of the record have been reproduced as appendices to this petition and are attached hereto.

"548.01 Prize Fighting, Pugilistic Exhibitions: Penalty

Any person who shall voluntarily engage in any pugilistic exhibition, fight or encounter, with or without gloves, between man and man, or in an exhibition or fight between man and bull, or between man and any other animal, for money or anything of value, or upon the result of which any money or anything of value is to be collected, acquired, bet or wagered, or to see which any admission fee is charged, directly or indirectly, shall be punished by a fine of not less than two thousand five hundred, nor more than five thousand dollars, or by imprisonment for not more than five years."

* * * * *

"548.03 Pugilistic Exhibition Defined

By the term "Pugilistic exhibition, encounter or fight, with or without gloves," as used in this chapter, is meant any voluntary fight or personal encounter, by blows, between two or more persons, for money, prize of any character, points, distinction or fame, or other thing of value, or upon the results of which any money or thing of value is bet or wagered, or for which an admission fee is charged, directly or indirectly; provided, that nothing contained herein or in any law or municipal regulation shall be construed as applying to boxing exhibitions held by and under the auspices of the American legion, disabled American veterans, veterans of foreign wars of the United States, Spanish-American war veterans, or companies or detachments of the Florida national guard, Y.M.C.A., junior chamber of commerce, or any college which is a member of any recognized amateur athletic association and the Circulo Cubana club, a charitable organization now in existence, whether an admission fee is charged or not; provided further, that nothing contained herein shall be

construed to prohibit any municipality from exercising its police powers to regulate boxing and wrestling exhibitions held under the auspices of the above named organizations."

Pursuant to that statutory authority, the City of Miami Beach, Florida, on or about January 25, 1935, created the Miami Beach Boxing Commission which has remained in existence and has exercised the authority vested in it continuously since that time. At all of the times material herein, Article II of Chapter 27 of the Miami Beach City Code, "Boxing and Wrestling," a copy of which is attached hereto marked Appendix C, has been in full force and effect. The Boxing Commission appointed in accordance with the terms of that Miami Beach ordinance adopted rules and regulations effective April 1, 1960. A copy of the relevant portion of those rules and regulations is attached hereto marked Appendix D.[4]

The contract between plaintiff and defendant, as well as every detail of the presentation of this boxing match was under the closest, continuous scrutiny of the Miami Beach Boxing Commission which approved the exhibition, the promoter, and every step in the promotion before it was taken, and approved the whole after the match. See e.g., attached hereto as Appendix E, extracts from Miami Beach Boxing Commission minutes, Exhibit 7, App. 113-129. In addition, the State's Attorney of Dade County, Florida, in which the City of Miami Beach is located, conducted an independent investigation of the match and concluded that there had been no violation of the law of Florida.

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[4] These Florida statutes, municipal ordinance, and administrative regulations are part of the record in this cause, Exhibit 5, App. 73-113.

It is uncontradicted that on demand defendant refused to pay the plaintiff approximately $400,000.00 of the amount which MacDonald had contracted to pay to plaintiff. Similarly, the bonding company which was surety on a $300,000.00 bond furnished by MacDonald in accordance with the terms of the contract between plaintiff and defendant, refused to pay on that bond.

An action for damages for breach of that contract was brought in the United States District Court for the Southern District of Florida, by plaintiff, a Pennsylvania corporation, against defendant, a Florida resident and citizen, and the surety company, a New York corporation, doing business in Florida. On motion of defendant the original complaint was dismissed on the ground that the contract was illegal because it was in violation of the Florida statutory prohibition of "pugilistic exhibitions." A motion for leave to amend the complaint was filed alleging that the match was held in accordance with the provisions of the exception of Sec. 548.03, Fla. Ann. Stats., supra, pp. 4-5. On appeal the Court of Appeals for the Fifth Circuit reversed the decision of the district court dismissing the complaint, ordered a trial, and ruled that the contract between plaintiff and defendant, on its face, was not illegal under the law of Florida, 367 F. 2d 293, 301-303 (C.A. 5th 1966).

Judge Coleman of Mississippi, who also served as a member of the panel whose decision petitioner now asks this Court to consider, dissented saying:

> "I must respectfully dissent. I am of the opinion, as the District Judge held, that the contract for the prize fight was illegal on its face. This being a ques-

tion of Florida law, which more appropriately could have been settled by the courts of that State, I shall refrain from further discussion." (367 F. 2d 293, 303).

Pursuant to leave of Court first had and obtained, an amended complaint was filed by plaintiff on or about January 31, 1969, with an amendment thereto filed on February 17, 1969. In his answer to that amended complaint and an amendment thereto, the defendant contended that the proviso contained in Sec. 548.03 relied upon by plaintiff was unconstitutional "in that it violates the equal protection and/or due process provisions of both the State and Federal Constitutions," (App. 34-35).

On the trial of the cause the district court found in pertinent part:

* * * * *

V.

"The defendant MacDonald, having invoked the provisions of §548.03, Florida Statutes, in aid of his contract with plaintiff, cannot now assert its unconstitutionality to escape the burdens of the contract.

VI.

In seeking to avoid liability under the contract in issue, the defendants have raised several issues of law and fact.

The defendants have adopted the position that the fight was not conducted in accordance with the provisions of Florida Statute §548.03. The statute, penal in nature, prohibits pugilistic exhibitions except when conducted by and under the auspices of various named organizations, including the Veterans of Foreign Wars. It was the obligation of the defend-

ants under the contract between the parties to comply with the statute and otherwise to stage a lawful fight. While there is testimony which indicates that the fight was held under the auspices of the VFW, but not by the VFW, the defendants are estopped from asserting non-compliance with the statute. The Fifth Circuit Court of Appeals in its earlier decision in this case, stated that MacDonald had the obligation to conduct a lawful fight. The defendants therefore cannot assert as a defense their own failure to lawfully conduct the fight.

In addition, the last provision of §548.03, Florida Statutes, provides:

> 'Provided further, that nothing contained herein shall be construed to prohibit any municipality from exercising its police powers to regulate boxing and wrestling exhibitions held under the auspices of the above named organizations.'

[R. 729] The evidence before the Court indicates that the municipality of Miami Beach exercised its police power in regulating this match and it was held under the auspices of the VFW Post No. 3559." (App. 39-40).

* * * * *

On the second appeal this decision was reversed on two stated grounds. The first was that the Court of Appeals concluded that the finding of the district judge was "clearly erroneous" with respect to the participation of the Veterans of Foreign Wars in the staging of this boxing exhibition. The other was that the law of the State of Florida was clear and unambiguous to the effect that the contract between plaintiff and defendant could

not be enforced. 441 F. 2d 1356, 1359, and 1360-1361 (C.A. 5th 1971).

A petition by plaintiff to have the applicable questions of state law certified to the Supreme Court of Florida in accordance with the provisions of Fla. Ann. Stats. § 25.031, and Rule 4.61 of the Florida Appellate Rules, copies of which are attached hereto marked Appendices A and B, was denied on or about May 12, 1971. A copy of that order is attached hereto marked Appendix F.

We respectfully submit that the law of Florida is determinative as to the rights of the parties to this controversy; that the decision of the Court below is inconsistent with the law of Florida, and that the applicable state law is complex, far from clear and unambiguous, and, as yet, in part undetermined by Florida appellate courts, so that in accordance with the views of this Court previously expressed, these proceedings should be stayed until such time as rulings of the Florida Supreme Court can be obtained concerning these issues of state law; and further that the most recent decision of the Court of Appeals in this cause denies substantial constitutional rights to the plaintiff.

ARGUMENT.

It is apparent that all of the parties and the courts, as they must, recognize that the rights and obligations of plaintiff and defendant are to be determined in accordance with the law of Florida. Plaintiff sues for damages for breach of a contract which could only have been performed in Florida. Defendant seeks to avoid his obligations under that contract by claiming that he failed to comply with the law of Florida in carrying out the contract. The district judge in the original proceeding involving this matter concluded that the contract on its face was illegal under the law of Florida. The Court of Appeals for the Fifth Circuit was of the opposite view and ruled that even though the Veterans of Foreign Wars was not a party to the contract between plaintiff and defendant, there was nothing inconsistent in that veterans' organization, one of the approved groups under the provisions of Fla. Ann. Stats. §548.03, from being regarded as holding or providing its auspices for holding the boxing exhibition between Clay and Liston, all in accordanee with the law of Florida. On the trial, the district judge was of the opinion that the presentation of this boxing exhibition was in accordance with the law of Florida. The Court of Appeals on review of that decision, came to the opposite conclusion. No suggestion was ever made, however, by any of these courts, or by counsel for either plaintiff or defendant, that the law of Florida was not determinative.

U.S.C. Title 28, § 1652 provides:

> "The laws of the several states, except where the Constitution or treaties of the United States or Acts

> of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply."

This Court has emphatically declared that a decision by a federal court in such a case not based on state law would deny constitutional rights. See *Erie R. Co.* v. *Tompkins,* supra.

The disagreements in this cause, however, are as to the meaning of the law of Florida, particularly that portion of § 548.03 authorizing "boxing exhibitions held by and under the auspices of" certain specified veteran and civic organizations. That provision has never been construed or applied by a Florida appellate court.

It is uncontradicted in this record that all of the local Florida authorities, that is the Miami Beach Boxing Commission, and the City of Miami Beach, found the arrangements, contract, and presentation of the Clay-Liston boxing exhibition to be in accordance with that proviso. In addition to the express approval of the arrangement specified hereinbefore, it should be observed that this boxing exhibition was presented in the Miami Beach Convention Hall, which is the property of the City of Miami Beach, Florida. This was in accordance with a contract or lease (App. 143) between the City of Miami Beach and defendant's assignee. That lease expressly provided:

> "1. That said lessee will comply with all laws of the United States and of the State of Florida, all ordinances of the City of Miami Beach, and all rules and requirements of the police and fire departments or other municipal authorities of the City of Miami Beach, and will obtain and pay for bodily injury

liability and property damage insurance as required by the City and all necessary permits and licenses, including union or trade organization clearances and will not do or suffer to be done anything on said premises during the term of this lease in violation of any such laws, ordinances, rules or requirements, and if the attention of said lessee is called to any such violation on the part of said lessee or of any person employed by or admitted to the said premises by said lessee, such lessee will immediately desist from and correct or cause to be corrected such violation."

Moreover, the City Council of Miami Beach, Florida, expressly approved that lease by Resolution No. 11167 (App. 145), a copy of which is attached hereto marked Appendix G. That resolution was adopted on February 19, 1964, only a few days before the bout and after the arrangements were a matter of public record before the Miami Beach Boxing Commission.

Actually, of course, we respectfully submit that it is readily apparent that the last decision of the Fifth Circuit Court of Appeals is not in accordance with the law of Florida and, accordingly, plaintiff has been denied rights guaranteed by the constitution and laws of the United States. It should be noted that this constitutional question did not, and could not, arise until after the decision of the Fifth Circuit Court of Appeals.

In its last decision in this cause, the Court of Appeals observed:

> "We remanded this case for a factual determination of 'whether the fight actually was held by and under the auspices of one of the approved groups.' 367 F. 2d at 303. The District Court held that it was so held, finding specifically 'that the municipality

of Miami Beach exercised its police power in regulating his match and it was held under the auspices of the VFW Post No. 3559.' We do not agree, as the evidence is overwhelmingly to the contrary, and the Trial Judge's ruling is clearly erroneous. Fed. R. Civ. P. Rule 52(a)." 441 F. 2d 1356, 1359.

It is doubtful that this is a fair construction of the prior opinion of that court which stated:

"Even without benefit of the amended complaint, the contract is not on its face unlawful. MacDonald's obligation under the contract 'to stage and handle the live aspect of the promotion' should be construed to include the burden of making arrangements for a *lawful* fight. If there is any doubt as to what the parties meant, a trial should be had, not to contradict the contract but to show what the parties meant by their contract. The defendants should not be allowed to escape from a bad bargain simply because the contract at the time it was entered into was capable of both lawful and unlawful performance. In the circumstances of this case, illegality is an affirmative defense to be raised in the answer and proved by the defendants who bear the burden of proof on this issue. The defendants raised the issue prematurely in their motion to dismiss. The plaintiffs are entitled to their day in court. (We do not reach the question whether MacDonald *could* assert invalidity as a defense where he was the party responsible for failing to bring the contest within the statutory exemption.)" 367 F. 2d 293, 303.

The finding of the district judge on the trial, that the presentation of this boxing exhibition satisfied the requirements of the Florida statute, could hardly have been deemed to be "clearly erroneous" when he did no more than to reach the same conclusion that the responsible Florida state officials had reached.

It is well settled in Florida, as in the federal courts, and in other jurisdictions, that the construction of statutes by administrative officers charged with their enforcement is entitled to great weight. See, e.g., *Miller* v. *Brewer Co. of Florida, Inc., et al.,* Fla., 122 So. 2d 565 (1960); *Daniel* v. *Florida State Turnpike Authority,* Fla., 213 So. 2d 585 (1968); *State of Florida* v. *Florida Development Commission,* Fla., 211 So. 2d 8, 12 (1968).

In that last case, the court said:

> "It is well settled that the construction given a statute by the administrative agency charged with its enforcement and interpretation is entitled to great weight and the court generally will not depart therefrom except for the most cogent reasons and unless clearly erroneous. *Miller* v. *Brewer Co. of Fla.* (Fla. 1960), 122 So. 2d 565. See also *Pirman* v. *Florida State Improvement Commission* (Fla. 1955), 78 So. 2d 718. Here, the plans for the proposed Capitol Center Project were approved by the Capitol Center Planning Committee (a majority of whose members are legislators), the Planning and Architectural Advisory Council, the Board of Commissioners of State Institutions, the State Board of Administration, and the Florida Development Commission. The legal and fiscal sufficiency of the bond issue was also approved by the Bond Review Board, in addition to the three state administrative bodies referred to above. In these circumstances and in the absence of a showing that their judgment as to the legislative intent and as to the fiscal feasibility and legal sufficiency of the bonds was clearly erroneous, the contentions of the appellants in this respect cannot be sustained."

It is thus apparent that the Court of Appeals for the Fifth Circuit in its most recent decision ignored the

administrative construction of the applicable Florida statutes, and at best reached a conclusion of doubtful validity under the law of Florida. In any event, it cannot be said that with the patent disagreement between federal judges and between some federal judges and state officials as to what the law of Florida is, that the state law is so clear and unambiguous as to justify the refusal of the Court of Appeals to seek the views of the Florida appellate courts concerning these legal questions.

As this Court pointed out in a comparable situation in *Jackson* v. *Ogilvie,* 401 U.S. 904, 91 S. Ct. 642 (1971):

> "While these issues are by our federal standard 'justiciable,' federal courts are usually less able than state courts to work their way through a maze of state electoral laws. If federal courts take the laboring oar in these so-called 'emergency' cases involving local electoral laws, they must make quick decisions on local law issues that are often tangled with matters of local construction and administration.*
>
> *One of the underlying local law issues involves the question as to what people are qualified to sign nominating petitions for independent candidates such as petitioners. There is one view that the signatures must be of persons who did not vote in the preceding primary election for nominees of candidates for that office, and there is the opposed view that any registered voter may sign nominating petitions for independent candidates."

As to a second issue of state law which it believed to be involved, the Court of Appeals said:

> "A second issue before us is the finding by the District Court that inasmuch as MacDonald had the obligation of conducting a lawful fight under the contract, defendants were estopped from asserting

noncompliance with the exclusion clause of Florida Statutes Annotated § 548.03.

The law of Florida is to the contrary. . . ." 441 F. 2d 1356, 1360.

It is doubtful that the district court so ruled. See App. 39-40, supra, pp. 7-8. In any event, the precedents relied upon by the Court of Appeals to support its conclusion as to the law of Florida in this regard do not support that conclusion. In not a single one of those cases, or in any other, has a Florida appellate court ruled that a breach of contract by a defendant could constitute a defense for him against an action by a party to the contract for damages on account of the defendant's breach of contract.

In the instant case the terms of the contract (App. 61-68) put the choice of methods used in carrying out the contract wholly within the control of the defendant (App. 8, supra, p. 3). Defendant had the sole right and obligation "to promote said boxing contest in the manner he deems satisfactory . . ."

The Court of Appeals chose to ignore defendant's recognition of his authority and legal obligation contained in his letter of December 26, 1963, in which he confirmed the understanding with Veterans of Foreign Wars Post 3559 for its sponsorship of the Liston-Clay bout. A copy of that letter (Plaintiff's Exhibit 17, App. 153), is attached hereto marked Appendix H. To the same effect is the Owners, Landlords and Tenants liability policy secured by defendant in accordance with the requirements of the Miami Beach Convention Hall lease. That policy listed as insured "sponsors" Chris Dundee and Miami Beach Post #3359 (sic) Veterans of Foreign

Wars of the United States (Plaintiff's Exhibit 16, App. 147). Chris, of course, was defendant MacDonald's associate in Dundee-MacDonald, Inc., to which MacDonald had assigned his contract rights (App. 67).

It is clear that by the law of Florida a contract is presumed to be made with intent to do acts in accordance with the law of place and performance of the contract. As the Supreme Court of Florida pointed out in *Shavers et al.* v. *Duval County, et al., Fla.*, 73 So. 2d 684, 689 (1954):

> "It has long been firmly established that the laws existing at the time and place of the making of the contract and where it is to be performed which may affect its validity, construction, discharge and enforcement, enter into and become a part of the contract as if they were expressly referred to or actually copies or incorporated therein. . . ." (citing cases).

See also *General Development Corporation* v. *Catlin*, Fla., 139 So. 2d 901 (1962).

The statutes of the State of Florida and the first decision of the Court of Appeals in this cause make it eminently clear that the presentation of a boxing exhibition is not contrary to the public policy of the State of Florida. Thus the cases dealing with refusal to enforce contracts contrary to public policy relied upon by the Court of Appeals in its second decision have no proper application in this cause.

Similarly, the Court of Appeals in its second decision ignored the decisions of the Florida courts as to the effect of the illegality of the conduct of a defendant as a defense for his own wrongdoing. The applicable precedents are not those cited by the Court of Appeals,

but rather are *Torreyson, et al.* v. *Dutton, et al.*, Fla., 188 So. 805, 807 (1939) and *Standard Accident Insurance Co.* v. *Bear, et al.*, Fla., 184 So. 97 (1938).

In the first of those cases the failure of a mortgagor to pay real estate taxes on the property which was security for the mortgage as the mortgage obliged him to do was held to bar the mortgagor from pleading the supremacy of a title acquired by him by way of a tax sale as against the rights of the mortgagee. As the court pointed out,

> "It is a well settled principle of law that one may not take advantage of his own wrong."

The *Standard Accident Insurance* case, supra, was to the same effect. There a property owner who, having been served with notice of a supplier's mechanics lien, paid an amount to the contractor greater than that owed to the supplier was not allowed to prevail in a complaint against the contractor's surety because the property owner had failed to carry out his obligation to the supplier under the terms of the Florida law. As should have been done here, the court in that case properly regarded the provisions of the Florida mechanics lien law as a part of the contract between property owner, the contractor, and the surety.

Any fair consideration of these precedents, together with those relied upon by the Court of Appeals, makes it abundantly evident that either the court is in error as to what the law of Florida is, or that the law is not so clear and unambiguous as to warrant the refusal of the Court of Appeals to conform to the requirements of the doctrine of "abstention" so often enunciated by this Court. This is particularly true where, as here, a procedural device to obtain the views of the Florida Su-

preme Court as to the operative questions of Florida law is so readily available. See Fla. Ann. Stats. §25.031, and Rule 4.61, Florida Appellate Rules, attached hereto as Appendices A & B.

CONCLUSION.

For all the above and foregoing reasons, petitioner respectfully urges this Court to vacate its order denying the Petition for Certiorari, to issue that writ and on review to reverse the decision of the Court of Appeals. In the alternative petitioner prays this Court to stay the effect of the order of this Court denying the petition, to direct the Court of Appeals for the Fifth Circuit to stay its mandate, and urges this Court to certify the questions of state law involved in this cause to the Supreme Court of Florida.

Respectfully submitted,

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NOVEMBER 5, 1971

CERTIFICATE OF COUNSEL

As one of counsel for the petitioner, I hereby certify that this petition for rehearing is presented in good faith and not for delay and is restricted to the grounds specified in Rule 58(2) of the Rules of this Court.

/s/ William R. Ming, Jr.
Counsel for Petitioner

APPENDIX A

25.031 *Supreme court authorized to receive and answer certificates as to state law from federal appellate courts*

The supreme court of this state may, by rule of court, provide that, when it shall appear to the supreme court of the United States, to any circuit court of appeals of the United States, or to the court of appeals of the District of Columbia, that there are involved in any proceeding before it questions or propositions of the laws of this state, which are determinative of the said cause, and there are no clear controlling precedents in the decisions of the supreme court of this state, such federal appellate court may certify such questions or propositions of the laws of this state to the supreme court of this state for instructions concerning such questions or propositions of state law, which certificate the supreme court of this state, by written opinion, may answer.

25.032 *Same; rules and regulations*

The supreme court of this state is hereby authorized and empowered to collaborate with any and all other courts of last resort, of other states and of the United States, in the preparation and approval of uniform rules of court to make effective this and similar laws.

APPENDIX B

Rule 4.61. *Certified questions from federal courts*

a. When Certified. When it shall appear to the Supreme Court of the United States, or to any of the Courts of Appeal of the United States that there are involved in any proceeding before it questions or propositions of law of this state which are determinative of said cause and that there are no clear controlling precedents in the decisions of the Supreme Court of this state, such federal appellate court may certify such questions or propositions of law of this state to the Supreme Court of Florida for instructions concerning such questions or propositions of state law.

b. Jurisdiction. Questions or propositions of law referred to in sub-paragraph a hereof shall be certified for answer to the Supreme Court of this state.

c. Method of Invoking Rule. The provisions of this rule may be invoked by any of the federal courts referred to in sub-paragraph a hereof upon its own motion or upon the suggestion or motion of any interested party when approved by such federal court.

d. Contents of Certificate. The certificate provided for herein shall contain the style of the case, a statement of facts showing the nature of the cause and the circumstances out of which the questions of propositions of law arise and the question of law to be answered.

e. Preparation of Certificate. The certificate may be prepared by stipulation or as directed by such federal court. When prepared and signed by the presiding judge of said federal court, it shall be certified to the Supreme Court by the clerk of the federal court and under its official seal. The Supreme Court may, in its discretion, require the original or copies of all or any portion of the record before the federal court to be filed with said certificate where, in its opinion, such record may be necessary in the determination of said cause.

f. Costs of Certificate. The costs of the certificate and filing fee shall be equally divided between the parties unless otherwise ordered by this Court.

g. Briefs and Argument. The appellant or moving party in the federal court shall file and serve upon its adversary its brief on the question certified within 30 days after the filing of said certificate in the appellate court of this state having jurisdiction. The appellee or responding party in the federal court shall file and serve upon its adversary its brief within 20 days after the receipt of appellant's or moving party's brief and a reply brief shall be filed within 10 days thereafter.

h. Oral Argument. Oral argument may be granted upon application and, unless for good cause shown the time be enlarged by special order of the Court prior to the hearing thereon, the parties shall be allowed the same time as in other causes on the merits.

APPENDIX C

ARTICLE II of CHAPTER 27 of Miami Beach City Code BOXING and WRESTLING

SEC. 27.2. *Definitions.*

The following words, when used herein, shall for the purpose of this article, have the meanings respectively ascribed to them as follows:

(a) *Exhibitions.* Exhibitions shall include any show, encounter, fight or match, with or without gloves, commonly considered a boxing or wrestling match, the same being voluntary between two or more persons for money, prizes of any character, points, or fame, or any other thing of value, or upon the result of which any money or thing of value is bet or wagered, whether admissions fees are charged or not, directly or indirectly.

(b) *Person.* Person shall include a natural person, a corporation created under the laws of this or any other state, a partnership, association or a joint stock company.

(c) *Promoter.* Promoter shall include any person, association or corporation engaged in advertising, encouraging, promoting or bringing about an exhibition in the city. (Ord. No. 371, & 1.)

SEC. 27.3. *Boxing Commission.*

A commission is hereby created to be known as the boxing commission of the city whose duty it shall be to

administer and provide for the enforcement of all the provisions of this article. The commission shall consist of five members to be appointed by the city council, any three of whom shall constitute a quorum. Until August 5th, 1953, the commissioners shall serve during the pleasure of the city council and on and after August 5th, 1953, the commissioners shall be appointed for and shall serve for two-year terms and until their successors are duly appointed and qualified. The terms of office of the members appointed on the 21st day of August, 1957 shall expire on the 30th day of September, 1959 and thereafter members of the commission shall be appointed for terms of two years commencing from the date of the expiration of the term of their predecessors, and shall serve until their successors are duly appointed and qualified. The commission shall have its office in the city hall and in rooms to be provided by the city for that purpose, and all of its records shall be there kept. The commission shall hold meetings upon such days as may be determined by the commission and may hold special meetings upon the call of the chairman or any three members. It shall keep a complete record of all its meetings, all its acts and all the business it transacts, and may prepare all necessary regulations and blank forms for the conducting of its business.

The commission may employ from time to time such clerks and employees as are necessary for the administration of this chapter and shall pay salaries to such clerks and employees only out of such funds as the commission may procure as hereinafter provided. The commission and each of the members shall take and file the oath of office prescribed by law.

The commission shall report to the city council annually the work during the preceding year.

The commission shall regulate and supervise and have jurisdiction over all pugilistic, boxing, wrestling or similar public exhibitions in the city. (Amended 11-20-57)

SEC. 27.4. *Permit—Required.*

No person shall advertise, encourage, promote or engage in any exhibition, as defined by section 27.2 of this Code, directly or indirectly, without having first obtained a permit for the holding of such exhibition from the commission as hereinafter provided. (Ord. No. 371, & 3.)

SEC. 27.5. *Same—Application Generally; Application Fee.*

(a) No permit shall be issued by the boxing commission unless application therefor shall be first filed with the commission in writing and filed with the commission on or before five days prior to the date on which any such exhibition is intended to be held, with the right nevertheless for the commission to alter the time within which the application shall be filed. Such application shall be upon forms prescribed by the commission for that purpose and signed by the person intending to conduct or promote such exhibitions. If the applicant is a corporation, the application shall be signed in the corporate name by the president thereof and if the applicant is a partnership or association the application shall be signed by a member of such partnership or association.

(b) The application for permit must be duly sworn to by the applicant certifying to the truth of the state ments therein contained.

(c) The application shall contain the following information:

1. The name, age and residence of the applicant, and his sponsor who must be one of the following: American Legion, Disabled American Veterans, Veterans of Foreign Wars of the United States, Spanish-American War Veterans, or companies or detachments of the Florida National Guard, Y.M.C.A., or any college which is a member of any recognized amateur athletic association and the Circulo Cubana Club, a charitable organization now in existence.

2. The length of time the applicant has resided or done business in the city.

3. Whether the applicant intends to promote the exhibitions for himself or for others.

4. If the applicant is not alone in the promoting of the exhibition he shall give the names and addresses of each and every one of his associates in connection with the exhibition.

5. If applicant is a corporation or partnership the names of all stockholders and partners shall be set forth in full and the interest of each.

6. A financial statement shall be given by the applicant from which the commission may determine the financial responsibility of the applicant.

7. The exact time, day and hour of the day, when the exhibition is intended to be held.

8. The exact place where the exhibition is intended to be held.

9. The names of the contestants intended to be engaged in the exhibition, together with information as to the amount of money or guarantee each contestant is to receive or has been promised.

The commission may require the applicant to submit any other and further information it may in its judgment deem necessary to enable it to ascertain the merits of such application.

At the time of the filing of the application with the commission as aforesaid, the applicant shall pay to the commission a fee of five dollars, which fee shall be deposited in a fund belonging to the commission for the purpose of paying its administrative expenses. (Ord. No. 371, & 4; Ord. No. 448, 2, 3.)

SEC. 27.6. *Same—Prerequisites And Conditions Generally To Issuance.*

After the filing of the application with the commission, it shall be the duty of the commission to consider and determine the merits of the application at a regular or special meeting held for that purpose. If upon examination of the application, the commission shall find that the applicant is of good moral character and financially able to promote the exhibition, that the time is satisfactory and the place of holding the exhibition has been approved by the city council of the city and is in conformity with the Zoning Ordinance and that the exhibition is not against the public welfare and that the contestants are properly matched and are in sound physical condition at the time of the contest, then a permit may be issued by the commission to such applicant to promote and carry out the exhibition. Every such permit

issued to such applicant shall be subject to any and all rules and regulations made by the commission. No permit shall be issued except as herein provided.

The commission may issue a permit for the holding of such exhibitions upon such terms and conditions as may be prescribed by it, and may in its discretion, change or modify such conditions from time to time, and may in its discretion, withdraw or cancel any permit already issued upon proper cause. (Ord. No. 371, & 5; Ord. 443, & 4.)

SEC. 27.7. *Same—Bond Required; Fee.*

After the commission has acted favorably upon any application, but before such permit is issued, the applicant shall furnish to the city a surety company bond, or a property bond with two good and sufficient sureties, owning real property in the city, in an amount to be fixed and determined by the commission and city attorney at the time of granting the permit, the bond to be conditioned upon such terms and conditions as may be fixed and determined by the commission, particularly upon the condition of the faithful holding and carrying through of the exhibition intended to be staged or promoted by the applicant or the return by the applicant of all moneys received by the applicant in the sale of tickets or otherwise, in connection with the exhibition. Upon the issuance of the permit, the applicant shall pay to the commission a fee of one dollar. (Ord. No. 371, & 6.)

SEC. 27.8. *Suspension And Fining Of Contestants, Etc.; Disposition Of Fines.*

(A) For the violation of any of the provisions of this article or the rules of the Commission, the Commission

shall have the power to fine or suspend, or to fine and suspend any promoter, manager, contestant, second or any licensee or permittee issued a license or permit by the Commission. In addition to such fine or suspension the Commission shall have the power to cause the purse of any contestant to be forfeited. All such fines and forfeitures shall be turned over by the Commission after ninety (90) days to the Welfare Department of the City for charity purposes. Nothing herein shall be construed to limit the power of the Commission to fine and suspend any other person coming under its jurisdiction. No person shall be fined or suspended, or the purse of any contestant be forfeited except after due notice and opportunity to be heard by the Commission at such time and place as designated by it.

(B) Any person deeming himself aggrieved by the order or judgment of the Commission under the provisions of this section may appeal therefrom to the City Manager. Such appeal must be taken within ten (10) days from the rendition of such order or judgment. Such appeal shall be commenced by filing a notice thereof with the Commission, and specifying the grounds thereof. Upon the filing of such appeal the Commission shall forthwith transmit to the City Manager all the papers constituting the record upon which the order or judgement appealed from was entered. The testimony taken at any hearing had before the Commission shall not constitute a portion of the record to be transmitted to the City Manager unless so specified in the Notice of Appeal, and in that event, the cost of the transcription of such testimony shall be borne by the Appellant. The taking of an appeal shall not operate as a stay of proceedings,

unless so ordered by the Commission, subject, however, to the order of the City Manager.

Upon receipt of the record on appeal, the City Manager shall fix a reasonable time for the hearing of the appeal. The appeal shall be tried on the record and not de novo. The City Manager shall have the power to either affirm or reverse the order or judgment of the Commission, or to enter such order as should have been rendered by the Commission, and the same shall be final. (As amended July 18, 1952.)

SEC. 27.9. *Rules And Regulations.*

All exhibitions as defined by section 27.2 of this Code and all persons in anywise connected with, interested in or participating in any such exhibitions shall be subject to the rules and regulations and decisions of the commission as it shall from time to time prescribe for the conduct of such exhibitions, subject to the approval of the city manager. (Ord. No. 371, & 7.)

APPENDIX D

BOXING
Rules and Regulations
of the
Boxing Commission
of the
CITY OF
MIAMI BEACH, FLORIDA
BOXING COMMISSION
of the
CITY OF MIAMI BEACH, FLORIDA
—RULES AND REGULATIONS—

Offices of the Commission

The Commission shall maintain offices at the City Hall, Miami Beach, Florida.

Meetings of the Commission

Meetings of the Commission shall be held at such time and place as the call of the Chairman may designate.

Interpretation

In the interpretation of these regulations, unless the content indicates a different meaning:

The word "Commission" means the Boxing Commission of the City of Miami Beach, Florida.

The word "Promoter" means any corporation, unincorporated club or association, or individual engaged in the promotion of regularly scheduled or individual box-

ing shows or exhibitions, in compliance with the Statutes of the State of Florida.

Licenses and Fees

The Commission shall issue licenses to officials, contestants, managers, seconds and such other persons as it may, from time to time designate. A license is a prerequisite to participation, in any capacity, in boxing or wrestling exhibitions.

License fees shall be on a fiscal year basis running from October 1 to September 30 of the following year. No person convicted of gambling or a felony or of a crime involving moral turpitude shall be licensed under these rules.

Licenses must be applied for annually. Each applicant for an annual license shall, before such license is issued, be required to pay to the Commission a license fee. If the applicant is denied a license, for any reason hereinafter set forth, the license fee shall be returned. License fees shall be as follows;

Main Event Contest, Additional $5.00 per contestant per event except on TV shows.

Boxer's License, $5.00 per annum.

Second	$ 5.00
Manager	10.00
Announcer	15.00
Referee	25.00
Promoter or Matchmaker	250.00
Assistant Promoter or Assistant Matchmaker	150.00

Temporary licenses for special event referees subject to the discretion of the Commission

Annual application for licenses shall be made on forms to be supplied by the Commission and must contain such information as may be required by the Commission. All applications must be verified under oath.

Licenses issued under these rules may be suspended or revoked by the Commission at any time for violation by the licensee of any order, rule or regulation of the Commission or for other cause deemed sufficient by the Commission, including actions adjudged by the Commission as detrimental to boxing and wrestling or not in the best interests of boxing and wrestling.

If any license is refused, suspended or revoked, the Commission shall state its reasons for so doing and cause an entry of said reasons on the minutes of the Commission. Such action shall be subject to review by the City Manager of the City of Miami Beach as provided for in Section 27.8 of "The Code of the City of Miami Beach, Fla. 1950."

No person whose license has been revoked or who has been suspended by the Commission shall participate in any capacity in any boxing or wrestling exhibition during the period of such suspension or revocation, and shall not be permitted in the dressing rooms of any participant in such exhibitions, nor shall he communicate or attempt to communicate with such participants, their managers or seconds, or the referee, during any boxing or wrestling exhibition. Any person violating this rule shall be subject to expulsion from the arena or auditorium building.

Promoters

Qualifications for License

The Commission may, in its discretion, issue licenses to individuals or organizations holding boxing or wrestling exhibitions, and all such individuals or organizations must be duly licensed in order to hold such exhibitions. Any such license may be revoked at any time at the discretion of the Commission, for any infractions of rules governing Promoters or Matchmakers.

Before a Promoter or Matchmaker is issued a license the following shall be required:

1. That the applicant furnish to the Commission references as to his good character from at least five reputable citizens of Dade County.
2. That the applicant has never been convicted of any felony or of a misdemeanor involving moral turpitude.
3. That the applicant be a resident of Dade County for a period of at least six (6) months. The Commission may waive this requirement.
4. It shall be incumbent upon the Promoter or Matchmaker to file with the Commission public liability insurance providing limits of not less than $100,000 for injuries to one person, and $500,000 limit for one accident to two or more persons. Also property damage with a limit of $5,000.
5. A Promoter or Matchmaker shall deposit with the Commission a bond in an amount to be fixed and determined by the Commission and City Attorney. Said bond will be acceptable in the sum fixed, by either a certified check, surety bond, or cash.

Requirements

A Promoter or Matchmaker shall not advance any contestant more than one-quarter of his purse for an approved exhibition, before the said exhibition. In no other instance shall any Promoter or Matchmaker obligate any boxer financially or otherwise such as: by furnishing lodgings or board, personal loans, etc.

No Promoter or Matchmaker shall have any financial interest in any boxer who appears in any exhibition in any arena operated under their supervision.

Promoter or Matchmaker must, in case of a substitution, in a main bout, post in a conspicuous place in front of the arena, or directly over the cashier windows, notice of said substitution, and, if time permits, to so state in the newspapers and radio.

Licensed Promoters or Matchmakers shall only hold bouts specifically authorized in writing by the Commission.

All boxing shows shall consist of at least 32 rounds of boxing.

All Promoters or Matchmakers shall provide a suitable bulletin board in fighters' dressing rooms, so the Commission can post any bulletins desired. The Commission shall have the right to demand and receive from any Promoter or Matchmaker his entire pass or complimentary list.

Promoters or Matchmakers shall be held responsible for the arena in which they operate as to proper equipment, personnel, ushers, ticket sellers, etc., and in general anything pertaining to the correct handling of the show.

No "Prize Fights"

Contests are considered "boxing exhibitions" and not "fights" or "prize fights." No professional boxing contest will be permitted in connection with any theatrical performances.

Fraud Punished

Any person under the jurisdiction of the Commission found guilty of any fraud, sham, collusion or conspiracy detrimental to boxing or wrestling will be fined or suspended or both, at the discretion of the Commission.

Soliciting

There shall be no advertising over the public address system; no begging or soliciting shall be allowed at boxing or wrestling shows, without authorization from the Commission.

Publicity

No publicity of any nature shall be released concerning any bout until such bout has been officially approved by the Commission.

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Tickets

Promoters or Matchmakers shall see that all tickets shall have clearly printed on them the admission price of the ticket, and no ticket shall be sold at a price higher than the price so shown. All tickets shall specify the section, row and seat as shown in the official arena scale on file with the Commission.

The sale of tickets for any proposed exhibition is prohibited until plans showing the seating arrangements,

aisle spacing, exit facilities, and the location of fire appliances of the place where the exhibition is to be held have been approved by the Building and Fire Departments of the City of Miami Beach, and the Commission.

All tickets, exclusive of working press, officials, employees, and photographers shall have the price and name of Promoter and date and place of exhibition plainly printed thereon. Changes in ticket prices, places or dates of exhibitions shall be referred to the Commission for approval. Tickets of different prices must be printed on cardboard of different colors.

All complimentary tickets shall be either marked "COMPLIMENTARY" in large letters or properly punched.

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Officials

Designation of Officials

For all exhibitions, whether professional or amateur, all officials such as the Referees, Judges, Examining Physician and Timekeeper, etc., shall be designated by the Commission and only those officials so designated shall have authority to perform their respective functions.

Inspectors

The Commission shall from time to time, appoint such number of Inspectors as, in the discretion of the Commission, may be necessary. At least one Inspector shall be present at all exhibitions. No person who is, directly or indirectly, interested in the management of any contestant, or who is an individual Promoter or Matchmaker, or stockholder in or employee of a corporation, or interested in an unincorporated club or association engaged

in the promotion of exhibitions, shall be granted an Inspector's license. Inspectors shall work in cooperation and in conjunction with such police officers as may be detailed for this duty at the boxing exhibition.

The Inspectors shall have supervision over Boxers, Seconds and Managers and all matters that pertain to the outside of the ring, and to any actions of the contestants themselves while out of the ring. They shall check the condition of fight togs and bandages and other equipment the Seconds should have before entering the ring. Inspectors must report at all places to which they are assigned not later than one and one-half hours before start of exhibition. The Inspector in charge of a show shall file, in addition to the official report, a detailed account of any violations of the Rules and Regulations governing boxing or wrestling, particularly where a purse has been ordered held.

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Fines and Suspensions

Any violation of the rules or regulations of the Commission shall subject the violator to such penalty as the Commission may impose.

Minor infractions of rules during a boxing exhibition such as: Promiscuous splashing of water by Boxer's handlers; Seconds coaching during a round; unsanitary use of medicines on swabs by Seconds; excessive use of grease by Seconds after being warned; and profanity in the corners and unsportsmanlike conduct, will not be tolerated.

APPENDIX E

MINUTES
BOXING COMMISSION CITY OF MIAMI BEACH
DATE: Tuesday evening, December 17th, 1963
Place: [redacted] Lincoln Road, Miami Beach, Fla.
Present: [redacted]rris Klein, Chairman, Carl Gardner, Vice C[redacted]rman; Commissioners Ed Lassman, Al She[redacted]n and Dan Roth

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Bills were approved for payment: Wolfies $18.50 and Morris Klein $36.12 for telephone and telegrams re: securing the Liston vs. Clay match.

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Discussion took place on the advisability of holding a party for the staff. It was felt after much talk that this matter should be tabled for the time being and taken up at a later date, perhaps after the Championship fight.

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It was decided that Ed Lassman as President of the World Boxing Ass'n would ask Dundee for a copy of the contract between Clay and Liston and another copy to be placed on file with this Commission.

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Discussion too place re: the coming Championship fight. Since no request was made by any promoters it was decided to delay any official action at this time, but the secy was informed to prepare a list of things that will have to be agreed upon before this Commission grants approval for the match.

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MEETING OF THE BOXING COMMISSION

DATE: December 23rd, 1963, at 4 p.m.
Place: Mr. Ritter's Office, Miami Beach Auditorium
Present: Chairman of the Commission, Morris Klein, Commissioners Ed Lassman, Carl Gardner, Al Sherman and Dan Roth. Sec'y Bill Glick and William MacDonald, Chris Dundee, Claude Ritter and Mr. Frank Lewis.

The meeting was called to iron out some of the problems relative to the World Championship Fight between Cassius Clay and Sonny Liston.

The following items were brought up and answered.

1. Date of fight . . . Tuesday evening February 25th
2. Copies of contract between fighters. . . Ed Lassman said that he would request them as President of the WBA and see that the MBBC gets a copy of same
3. Promoters License. The license in the name of Dundee-MacDonald Enterprises would be requested with a fee of $250.00
4. Surety Bond and Public Liability: Mr. Ritter said that this was covered in the City Council's approval of the Convention Hall rental.
5. Seating at the apron. The Commission stated that the following seats would have to provided for at the ring apron for the match: 2 Judges; 1 Doctor in each corner, 1 Inspector in each corner, 2 Timekeepers and the five seats for the Commissioners and 1 for the Commission secretary.

6. Seating chart: Dundee informed the Commission that the seating charts are being worked on. That there would be 16,480 seats not including 352 Press seats. Mr. Ritter stated that this chart would be in hands of the Commission some time next week.

   Mr. MacDonald said they were going to double print the $50.00 seats and have two sets of the $20.00 seats. He also promised the Commission that he would have delivered a full chart of the seating and show the price scale. Mr. MacDonald also assured the Commission that there would be non scalping of tickets.

6. Officials: All officials will be supplied by the Miami Beach Boxing Commission.

7. Pre Fight Examination: Will be required by Commission.

8. Fee To Commission: The promoters agreed to pay the Miami Beach Boxing Commission a fee of $2500 to pay all expenses that the Commission would incur as a result of the fight being held here.

9. Complimentary Tickets: The promoters agreed that each member of the Boxing Commission staff would receive 1 working ticket and that all members of the Commission would receive 4 tickets complimentary.

Mr. MacDonald also assured that all tickets would be sold on a C.O.D. basis with a first come first served policy.

Dressing rooms for the main event fighters would be on the west side of the Convention Hall one on the north side and the other on the south side.

Andy Frain ushers would be in charge of the security and Mr. Ritter is working with Police Chief Rocky Pomerance for security, additional. The matter was brought up about the handling of the Press after the fight. At the last fight, the city received exceptional bad publicity as a result of a scrap between news men and the police. Ritter assured the Commission that he had gone over this with the Police Chief and that it would not happen this time.

Commissioner Al Sherman asked Ritter if there was some way that the TV cables could be covered so that people walking through would not be liable to tripping. Ritter said that though it was a difficult problem he would do his best.

Regarding the weigh-in on the day of the fight. It was decided to leave this matter to a later date for final discussion.

Mr. Ritter then said that he was instructed by Mr. Pushkin to prepare a full package on the results of the meeting and then he would be in touch with the Commission again.

Formal approval was asked by Dundee-MacDonal Enterprises to promote the Heavyweight Championship fight between Sonny Liston and Cassius Clay on February 25, 1964. The Commission approved and the secy was ordered to send a application for Promoters license to the above.

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MINUTES
MEETING OF THE MIAMI BEACH BOXING COMMISSION

DATE: Monday evening, February 17th, 1964.

Present: Morris Klein, Chairman; Ed Lassman, Carl Gardner, Dan Roth and Al Sherman, Commissioners, Angelo Dundee, representing Cassius Clay; Jack Nilon, representing Sonny Liston and members of the press and radio and TV.

The Commission after considerable discussion set down the following rules for the Liston-Clay match to be held Tuesday evening, February 25th:

1. 8 oz. gloves would be used
2. The Mandatory eight count would be in effect
3. If a fighter is floored and the bell rings signalling the end of a round, the count will continue. If the count reaches 10 and the fighter is still down, he will lose by a KO. If he gets up before the count of 10 he will proceed to his corner. The time he has spent on the floor will be deducted from his rest period.
4. The "three knock-down" rule will be waived.
5. The Commission will select the referee, timekeepers and Judges 30 minutes prior to the fight.

AT THIS POINT THE PRESS WAS INVITED IN AND THE CHAIRMAN TOLD THEM OF THE ABOVE-MENTIONED RULES.

Nilon objected to the waiving of the "three knock-down" rule. He also stated that he did not want Liston to be weighed in at the same time with Clay. After con-

siderable discussion, the Commission unanimously voted to hold the weigh-in at the Convention Hall, Tuesday morning at 10:30 a.m. and both fighters will be weighed in at the same time. Klein instructed both Dundee and Nilon to make sure that both fighters be prompt.

Dundee asked for a clarification of the rule which stated that the fighter must be clean shaven. He was informed that it did not mean that Liston would have to shave his mustache off.

The Commission then continued with its regular business after dismissing the press.

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Secretary advised commission that the $2500 fee from MacDonald Dundee Enterprises had not been received. Secretary was instructed to call Frank Lewis and arrange for fee.

Julian Cole, press representative for Dundee-MacDonald was then instructed by Commission that one side of the ring must be left for the exclusive use of the Commission. On the other three sides he is to meet with Bill Glick and work out the necessary arrangements for Doctors, Inspectors, and Judges. This is to be done on Thursday of this week.

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MINUTES OF BOXING COMMISSION MEETING

DATE: Saturday, February 22nd, 1964 at 11 A.M.
Present: Chairman Morris Klein, Carl Gardner, Al Sherman, Dan Roth. Ed Lassman absent

Meeting called to order by the Chairman to iron out the last minute details relative to Liston-Clay match.

Since only two tickets would be available for Drs. at Ringside, it was decided to have Dr. Kaplan sit near the dressing rooms for the purpose of being available for emergency.

The weigh-in for the fight was set for 10:30 a.m. in the Cypress Room of the Convention Hall. The Commission would be in full and complete charge of the weigh in.

It was decided to distribute the money to the staff for payment of their services after the fight when the Commission would meet again.

TNT requested that a "creepie peepie" camera be permitted to look at the score cards between rounds. This was OK'd.

The announcer was instructed to name all the Commissioners in his opening announcement.

The commission was informed that a dinner party had been set up at the Chandler's Rest. for the visiting members of the Executive Committee of the W.B.A. for Monday evening. At which time the M.B. Commission will be the hosts.

Request made by Jack Vivian and Dr. Brody for extra tickets for fight. Both received explanation from the Chairman that only one ticket had been allotted for each staff member of the Commission. The secretary was instructed to see that each man received his tickets prior to fight time.

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MEETING OF BOXING COMMISSION HELD IN MIAMI BEACH CONVENTION HALL,

FEBRUARY 25th, 1964 at 9 p. m.

Present: Commissioners Klein, Gardner, Roth & Sherman

Absent: Ed Lassman

This meeting was called to select officiating officials for the Heavyweight Championship fight between Sonny Liston and Cassius Clay as per agreement by Commission. Press was barred.

Selected by unanimous decision:

Referee: Barney Felix

Judges: Gus Jacobson and Bunny Lovett

Timekeeper: Gus Raynor

Knockdown Time Keeper: Scotty Lang

It was agreed that this information would be held confidential until 9:30 p.m. of this date.

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MEETING OF THE BOXING COMMISSION, CITY OF MIAMI BEACH

One Lincoln Road, Miami Beach

Date: Wednesday, February 26th at 5:30 p.m.

Present: Commissioners Klein, Gardner, Roth and Sherman. Also, members of the Press

Chairman Klein opened the meeting and advised all that this meeting had been called to hear and receive the official reports from the Medical Staff relative to injuries of Sonny Liston received last night at the Heavyweight Championship fight.

Klein read a letter from Dr. Alex Robbins, Chief Medical Officer of the Commission stating that in his opinion, concurred by eight other doctors, that Liston had suffered an injury during the fight and was unable to continue.

The Commission all agreed that in their opinion that this report should be accepted and filed.

The press was called in and Commissioner Klein gave them a statement saying that in the opinion of this Commission there was no longer any reason to withhold the purse of Sonny Liston and that this Commission had accepted the medical report.

Press then asked for further clarification and this was given by various members of the Commission.

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MEETING OF THE BOXING COMMISSION OF THE CITY OF MIAMI BEACH

Date: March 3rd, 1964 at 7:30 p.m.

Place: One Lincoln Road, Miami Beach

Present: Commissioners Klein, Gardner, Sherman and Roth. Ed Lassman called and said that he could not attend but authorized the others to speak for him and that he would go along with their decisions.

Commissioner Klein, Chairman of the Commission advised that the meeting was called to iron out any matters left hanging from the Clay-Liston fight and to distribute the monies to the staff.

Glick then stated that the bank balance was $4723 with approximately $150 more due.

The Commission then unanimously decided as follows.

Referees	(six)	$600 to be divided equally
Announcer	(1)	$100
Judges	(6)	$150 to be divided equally
Timekeepers	(4)	$105—3 to receive $25 Chief to receive $30.00
Inspectors	(6)	$125 5 to receive $20 Chief to receive $25
Doctors	(3)	$100—2 to receive $25.00 Chief to receive $50.00
Executive Secretary	(1)	$100

The secretary was instructed to prepare checks and mail them with a thank you note to all staff members.

Mr. Klein informed the Commission that we should expect a bill in the amount of $108.00 from St. Francis Hospital for X-Rays for Sonny Liston and a bill in the amount of $100 from a Dr. Russin for Consultation. These were ordered paid upon receipt.

A bill from Chandler's Restaurant in the amount of $189.60 for the W.B.A. officials dinner was ordered paid in that amount.

A letter from Cassius Clay apologizing for his actions was read by the secretary. Further discussion relative the fine of $2500 was held by the Commission. The general feeling was that the fine levied by the Chairman upon Clay would stand.

Respectfully submitted;

/s/ W. Bill Glick
W. Bill Glick-Exec. Secy

DUNDEE-MacDONALD ENTERPRISES, INC.
Feb. 28th-1964

Mr. Morris Klein.
Chairman of the Miami Boxing Commission.
Miami Beach, Fla.

Gentlemen:

I want to take this opportunity of telling you and the other members of the Boxing Commission that I am deeply sorry for my actions at the weigh-in on Tuesday last—

I want you to know that it was only the pressures of the impending fight—Which caused my inconsiderate actions for this I deeply apologize—

Sincerely,

Cassius Clay
/s/ Cassius Clay
-Your World Champion
Good Luck
2-28 1964

MINUTES
MEETING OF THE BOXING COMMISSION OF THE CITY OF MIAMI BEACH

PLACE: One Lincoln Road, Miami Beach
DATE: SUNDAY, MARCH 15th, 1964 at 1:00 P.M.
Present: Commission Chairman Morris Klein, Vice-Chairman Carl Gardner, Commissioners Al Sherman, Ed Lassman and Dan Roth

The minutes of the meeting of March 3rd were read by Secretary Glick and approved.

Glick reported that there was $3612.66 on hand in the Mercantile Bank.

The following bills were ordered paid:

St. Francis Hospital	$108.00
Wolfies Restaurant	23.71

Chris Dundee has scheduled a fight for the evening of March 23rd as follows:

Otha Brown-Floyd McCoy	10 rds 3 mins.
* Jefferson Davis-Chip Johnson	10 rds 2 mins.
Chico Velez-Willie McCrea	8 rds 2 mins.
Stormy Winters-Jack Gilbert	4 rds 2 mins.
Joe Nardi-J. C. Ponder	6 rds 2 mins.
Bobo Davis-Stu Duncan	4 rds 2 mins.

The secretary informed the Commission that in his recollection there has been some trouble between Jefferson Davis and his manager Jack Kearns. The sec'y was instructed to get a clearance from Mr. Kearns.

* Secretary's note: I called Mr. Kearns on Wed. March 18th and was informed that it was perfectly OK with him to have Davis sign his own contract for this fight.

The above mentioned fights were approved.

Chairman Klein then informed the members of the Commission that they have all been invited to appear in the office of the Ass't State Attorney Sy Gelber on Wednesday morning, March 18th at 10 a.m. relative to the investigation of the Liston-Clay match.

Discussion then took place regarding the fine set on Cassius Clay. The secretary said that this office had not received any reply from Mr. Faversham in answer to the telegram sent to him on Feb. 25th informing him of the fine. On the question of the fine, Commissioner Lassman asked that this Commission take no action for the next 30 days and asked that the entire matter be tabled. This was seconded by Commissioner Roth.

Some discussion took place relative to some of the statements made by Liston's doctor, Dr. Bennett which had appeared in print purportedly stating that Liston was not in top physical shape for several days before the fight. No action was taken since the article in question was not available. Commissioner Gardner was asked to bring a copy of the article back from the State's Attorney's office . . . and then the secretary would write a letter to the Michigan State Athletic Commission asking them to get a statement from Dr. Bennett.

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APPENDIX F

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 29404

INTER-CONTINENTAL PROMOTIONS, INC.,

Plaintiff-Appellee,

versus

THE MIAMI BEACH FIRST NATIONAL BANK and FRED R. BAISDEN, as Executors of the Last Will and Testament of William B. MacDonald, Jr., deceased, Etc.,

Defendants-Appellants.

Appeals from the United States District Court
for the Southern District of Florida

Before GEWIN, COLEMAN and AINSWORTH, Circuit Judges.

By The Court:—

It Is Ordered that the motion for certification to The Supreme Court of Florida filed by Appellee in the above cause is hereby Denied.

APPENDIX G

RESOLUTION No. 11167

WHEREAS the City Council of the City of Miami Beach, Florida, has been advised that DUNDEE-MacDONALD ENTERPRISES, INC. desires to lease the premises and facilities of the Miami Beach Convention Hall for the purpose of WORLD HEAVYWEIGHT CHAMPIONSHIP BOXING on FEBRUARY 25, 1964, and

WHEREAS a lease agreement has been prepared by the Auditorium and Convention Hall Manager and approved as to form by the City Attorney, and

WHEREAS the City Council has been advised of and is familiar with the terms and provisions of the said lease agreement and deems it to be for the best interest of the City to authorize the execution of the said lease agreement,

NOW, THEREFORE, BE IT RESOLVED BY THE CITY COUNCIL OF THE CITY OF MIAMI BEACH, FLORIDA, that the Mayor and the City Clerk be and they are hereby authorized and directed to execute the above described lease agreement on behalf of the City, and that the Auditorium and Convention Hall Manager is hereby authorized and directed to carry into effect the terms and provisions undertaken therein by the City.

PASSED AND ADOPTED this 19th day of February, 1964.

/s/ Melvin J. Richard
Mayor

Attest:

/s/ Rubin L. Johnson
City Clerk
(Seal of clerk illegible.)

WITNESS my hand and the seal of said City, this 29th day of April A.D. 1969

Ruth B. Rouleau
City Clerk & Finance Director
of the City of Miami Beach,
Florida
by /s/ (Illegible) Pohzehl
Deputy City Clerk and Finance
Director

APPENDIX H

DUNDEE-MacDONALD ENTERPRISES, INC.

December 26, 1963

Veterans of Foreign Wars Post 3559
Mr. M. Lencher, Commander
440 - 16th Street
Miami Beach, Florida.

Dear Mr. Lencher:

We wish to confirm our understanding with you in that Dundee-MacDonald Enterprises, Inc. will contribute $500.00

to the Veterans of Foreign Wars Post 3559 with sponsorship and use of your name with the Liston-Clay World's Heavyweight Championship bout to be held at the Miami Beach Convention Hall on the evening of February 25, 1964.

Very truly yours,

/s/ Chris Dundee,
Chris Dundee, General Manager

FJL/h
cc: Wm. B. MacDonald, Jr.